Supreme Court, U.S.
FILED

041143 FEB 22 2005

OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

BANNER RESTORATIONS, INC.,

Petitioner,

v.

BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM AND MASONRY INSTITUTE BRICKLAYERS LOCAL 21 PENSION FUND

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GERARD C. SMETANA*
SMETANA & AVAKIAN
39 S. LaSalle Street
Suite 1218
Chicago, IL 60603
(312) 357-0250

* *Counsel of Record*

Attorneys for Petitioner

192782

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether Section 302(c)(5)(B) of the Labor Act (29 U.S.C. § 186(c)(5)(B) which only permits payments to be made to a trust fund in conformity with the terms "specified in a written agreement with the employer" is satisfied by coerced monthly contributions to Labor/ Management Trust Fund in the face of threats to interfere with the business of the employer by Trust Fund Representatives to coerce the payments, in the face of continued refusal by the employer to sign or acquiesce in an agreement and in the absence of any "written agreement" with the employer Petitioner.

2. Can an area collective bargaining agreement not governing the Petitioner's employees and never acquiesced in, manifest an intent to be bound solely by making monthly payments to Respondent Trust Funds, in the face of such payments being coerced at the beginning of each job and in the absence of any language on the monthly report forms incorporating all the terms of a Collective Bargaining Agreement specifically for the employees of the employer.

3. Was it error for the Court below to affirm an adverse credibility resolution that monthly payments to Respondent Funds was solely in response to such coercion set forth in Stipulation No. 23 and 29 after contribution to the Funds and payment of union wages and benefits and use of union apprentice program for workers in the face of stipulated refusal to sign an agreement or entry into a written agreement as mandated by Section 302(c)(5)(B) of the Labor Act.

4. Did the Court below commit error by inferring a manifest intent by the employer to be bound by a "course of conduct" in the absence of a "written agreement" without regard to coercion.

5. Must trust fund monies by returned to the employer if they were submitted as a mistake of fact or law where the employer submitted payments in the absence of a written agreement without the need for balancing equities normally required for restitution and additionally in the face of the unclean hands of the Trust Funds in retaining such monies and engaging in coercion to obtain payment.

LIST OF PARTIES

This Parties below are listed in the caption: The parties are Banner Restorations, Inc., Petitioner v. Bricklayers Local 21 of Illinois Apprenticeship And Training Program And Masonry Institute and Bricklayers Local 21 Pension Fund, Respondent.

There are no amicus curiae.

CORPORATE DISCLOSURE STATEMENT[1]

Banner Restorations, Inc. is an Illinois representative in good standing whose sole shareholder is Charles Ciancanelli and has no parent corporation and is not subsidiary to any other corporation.

Petitioner Banner Restorations, Inc.[2] petitions for Writ of Certiorari to review the Decision of the United States Court of Appeals for the Seventh Circuit issued in this case on September 22, 2004. That Decision, affirmed the Decision of the District Court denying Petitioner's Counterclaim for refund of pension payments made to certain specified Respondent ERISA Trust Funds by reason of mistake of fact or law. Respondent had initially filed a law suit seeking compliance with the audit requirements under ERISA to which Petitioner filed Counterclaim seeking return of only a portion of the contributions dealing with Pension and Annuity Trust Fund contributions paid as a mistake of fact or law under a Federal Common Law Restitution cause of action

1. Corporate Disclosure Statement required by U.S. Supreme Court Rule 29.6.

2. Inadvertently referenced as Banner Restorations, Incorporated, Defendant/appellant in caption of Decision below.

(see unpublished Memorandum Opinion and Order of the District Court - Appendix B - Affirmed by a Panel Decision of the United States Court of Appeals for the Seventh Circuit based upon a finding of manifest intent binding Petitioner to a collective bargaining agreement through course of payment to the Funds over a period of seven years even though there was no written agreement between the employer Banner with any labor organization that represented its employees and even though Stipulations of Facts entered at Trial acknowledged coercion to obtain such contributions to the Funds and acknowledged the employer's position that the reason it made the monthly payments was due to such coercion.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	iii
Corporate Disclosure Statement	iii
Table of Contents	v
Table of Cited Authorities	vii
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
I. A Course of Conduct Cannot Substitute For the Mandatory "Written Agreement"	2
II. There Is A Clear Conflict With The Second Circuit	7
III. All Relevant Facts Were Stipulated	8

Contents

	Page
IV. The Seventh Circuit Erroneously Relied Upon A Course of Conduct To Support An Agreement In Reliance Upon Cases In Which There Was An Earlier "Written Agreement"	12
V. Balancing of Equities For Return of Funds Is Not Required in the Absence of A "Written Agreement"	15
Reasons for Granting the Petition	16
Conclusion	25

TABLE OF CITED AUTHORITIES

Page

Cases:

Arroyo v. United States
359 U.S. 419 (1959) 18, 19, 24

Brown v. C. Volante Corp.
194 F.3d 351 (2d Cir. 1999) 22, 23

Gariup v. Birchler Ceiling and Interior Co.
777 F.2d 370 (__ Cir. ____) .. 6, 14, 15, 16, 20, 21, 22

NLRB v. Iron Workers Local 103 (Higdon),
434 U.S. 335, 54 L. Ed. 2d 586,
98 S. Ct. 651 (1973) 14

Moglia v. Geoghegan
403 F.2d 110 (2d Cir. 1968), *cert. denied,* 89 S. Ct.
1193 (March 24, 1969) ... 7, 14, 15, 19, 20, 22, 23, 24

Moriarty v. Larry G. Lewis Funeral Directors Ltd.
150 F.3d 773 (7th Cir. 1998) 4, 7, 14, 21, 23

Operating Engineers Local 139 v. Gustafs on Construction Corp.
258 F.3d 645 (7th Cir. 2001) 14

Robbins v. Lynch
936 F.2d 330 (7th Cir. 1988) 6, 13, 14, 16, 22

UIU Severance Pay Trust Fund v.Local Union 18-U United Steelworkers of America
998 F.2d 509 (7th Cir. 1993) 2, 15

Cited Authorities

Page

United States v. Gruttadauro
815 F.2d 1323 (7th Cir. 1987) 17

William Dunbar Co. v. Painters and Glazers District Council
129 F. Supp. 417 (D.D.C. 1955) 20, 21

Statutes:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 185 2

29 U.S.C. § 186 ..... i, 1, 17

Rule:

U.S. Sup. Ct. R. 14.1(f) 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided September 22, 2004 ..... 1a

Appendix B — Findings Of Fact And Conclusions Of Law Dated September 3, 2002 ..... 22a

Appendix C — Relevant Statute 35a

Appendix D — Stipulations Of Fact Filed September 17, 2003 ..... 39a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is recorded at __ F.2d __ (7th Cir. 2004) (decided September 22, 2004, Appendix A) affirming a Decision of Magistrate Judge Martin C. Ashman of the United States District Court for the Northern District of Illinois, Eastern Division entered September 4, 2002, Appendix B, including Finding of Facts and Conclusions of law as well as a Judgment Order entered on the same date, the Decision is not reported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(l).

The Seventh Circuit's Opinion was rendered on September 22, 2004. A timely Petition for Rehearing was filed by Appellant Banner Restorations, Inc. and denied on October 5, 2004. An application to Mr. Justice Stephens was filed by Petitioner Banner Restorations, Inc. for an extension of 60 days to file a Certiorari Petition. On November 19, 2004 this Court Granted Petitioner's Application for a 60 day extension of time to file its Petition for Certiorari to and including February 19, 2005.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 186

SUBCHAPTER IV – LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

The Provisions of 29 U.S.C. § 186 are lengthy and, therefore, set out in Appendix C, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

1. Petitioner Banner Restorations, Inc. hereafter Banner, seeks return of payments made to Respondents, Masonry Institute Bricklayers Local 21 Pension Funds made by mistake of fact or law based on a common law theory of restitution, a cause of action acknowledged by the Seventh Circuit in *UIU Severance Pay Trust Fund v. Local Union 18-U United Steelworkers of America*, 998 F.2d 509 (7th Cir. 1993). Petitioner seeks these monies as part of a timely filed Counterclaim to a routine request for an audit by Respondent Pension Funds. The claim of Petitioner arises as a result mandatory language in Section 302(c)(5)(B) of the Labor Management Relations Act (LMRA) 29 U.S.C. § 185 which in no uncertain terms mandates that (a) a "written agreement" required must be with a labor organization for ". . . the employee(s) of such employer" (Section 302(c)) the exceptions governing such lawful payments for which a "written agreement" is required must be ... *for the exclusive benefit of the employees of such employer* as set forth in subsection (B) ... which set forth. ... "the detailed basis on which such payments are to be made as specified in a written agreement with the employer ...". (App. C, 36a & 37a)

I. A Course of Conduct Cannot Substitute For the Mandatory "Written Agreement"

2. In this case the mandate of the Statute has simply not been fulfilled, and the Court of Appeal has committed clear error in its attempt to find a "course of conduct that manifests an intent to be bound. This is contrary to the clear statutory language in the absence of a "written agreement" between Banner and the Union that is the third party beneficiary of the Respondent. There never was at any time a "written agreement" which sets forth the detailed basis upon which such payments are to be made (normally contained in a signed

Collective Bargaining Agreement) with the particular employer and the labor organization representing that employer's employees. The undisputed facts in this case show Petitioner Banner never assented to a Collective Bargaining Agreement, when the Union and/or Trust Fund Representatives specifically asked him to sign.

3. Notwithstanding such refusal to become a signatory contractor the Union and Trust Fund Representatives (alter egos of each other, as they were the same persons) at the beginning of each job for construction restoration services on high rise buildings in Chicago (the work performed by Banner) de facto sought such agreement and threatened shut down of the job if union employees were not used and monthly reports showing Trust Fund payments for such union employees were not made.[3]

4. Trust Fund Representatives engaged in threats and coercion including actual picketing and threats to shut the job down by going to the customers for whom the restoration services were performed, either to the building managers or the owners. Threats were for the purpose of requiring Banner to

3. The uncontroverted testimony of Charles Ciancanelli, Jr. that the representatives who came to make coercive statements as stipulated in (Appendix D Stip. No. 23, (44a)) included Presidents of Bricklayers Local 21 Kenneth Lambert and Peter Marinopolous who each showed him their business cards showing they represented Respondent Trust Funds, as well as that they were Officers of Bricklayers Local 21. *See* Trial Transcript pages 113 Line 1 to page 115 Line 7) Even if the credibility finding of the Magistrate Judge is not overturned, the Judge only decided he did not credit the causal nexus between making the monthly payments and the stipulated coercive statements and picketing. Therefore such credibility finding does not diminish the uncontroverted testimony that the Union and Fund Representatives were alter egos for each other engaging in such coercive statements, including threats to neutral third parties to shut down the job if the monthly contributions to the Funds were not made.

use the union apprentice program (App. D, Stip. 21, 44a) to make monthly contribution reports and send in monthly checks to the Trust Funds (App. D, Stip. 29, 46a) even though a majority of Banner's employees were not members of the labor organization and even though the requirements of a written agreement with such labor organizations spelling out the terms of the agreement were never entered into, see footnote 9 of the Opinion of the Circuit Court herein acknowledging such fact and further acknowledging in the same footnote that the claim of the Respondent below in the Seventh Circuit that a certification of the monthly reports had been signed at some time by Banner was not of record (19a). The latter acknowledgment by the Seventh Circuit is consistent with footnote number 4 in the Decision of the Magistrate Judge which states "the March 1992 contribution report which allegedly contains Ciancanelli's signature, played no part in this Decision" (13a). Such alleged signed report was never produced by the Respondent and is not a part of the record.

5. The unsigned monthly reports coerced from Petitioner contain one or two legally deficient certifications not sufficient to create the "written agreement" mandated by Section 302(c)(5)(B) as the certification language fails to incorporate all the terms of a Collective Bargaining Agreement. Therefore even if a signed check, only included on 2 or 3 occasions constituted an "acceptance" it still could not create the requisite "written agreement as language of the certification itself was faulty apart from the fact it was never signed by Banner." The requisite language must incorporate all the terms of a Collective Bargaining Agreement.[4]

---

4. In *Moriarty v. Larry G. Lewis Funeral Directors Ltd.*, 150 F.3d 773 (7th Cir. 1998) The requisite "written agreement" mandated under Section 302(c)(5)(B) was found to be satisfied as a result of

(Cont'd)

6. The Seventh Circuit Panel in footnote 7 of the Slip Opinion (17a) addressing the certification language, in the instant case, as being deficient in incorporating by reference the necessary requirements under Section 302(c)(5)(B) that the "written agreement" failed to specify the detailed basis upon which payments are to be made. Nevertheless the holding of the Seventh Circuit that certain isolated conduct[5]

(Cont'd)
the employer having signed the monthly pension remittance forms which at the bottom contained language which states:

> ". . . hereby certify that the information contained in this report is true and correct, *and hereby agree to accept and abide by the terms . . . of the applicable Local 727, IBofT Labor Agreement and any amendments.*"

No such language is contained in the certification tendered and included with the one or two filings at the outset of this case, but in any case such certification was never signed by Banner which states: "I hereby certify that this is a report of all hours worked by bricklayers . . . the undersigned agrees to the term of payment to the Funds set forth in the applicable collective bargaining agreement . . ."

5. The "isolated" incidents relied upon at page 2 (2a) of the Slip Opinion of the Court of Appeals, that Banner would call the Local 21 Apprentice and Training Program to see if bricklayers were available was a part of the stipulated coercion visited upon Banner at the beginning of each job site (App. D, Stip. 29 (46a)).

Participation in 2 Joint Arbitration Hearings is similarly mischaracterized by the Court of Appeals as Mr. Ciancanelli came to such Hearing only to inform them that they had the wrong Banner Restorations and that Local 14 was a union involved in those proceedings other than Local 21. Also see footnote 6 infra showing admission against interest by Respondent admitting that what transpired in these Arbitration Hearings was as a result of a case of mistaken identity for which Petitioner Banner was not responsible.

(Cont'd)

by Petitioner manifests an intent to be found sufficient to meet the "written agreement" requirement of Section 302(c)(5)(B) is totally at odds with *all* of the prior Decisions of the Seventh Circuit in this area. In all those cases at some point earlier in time, there was in fact a written agreement entered into by the employer for his employees, either in the form of a letter of intent or being bound to a multiemployer bargaining agreement which were signed by the employer. The cases the Court cites in its Decision (8a) including *Gariup v. Birchler Ceiling and Interior Co.*, 777 F.2d 370, *Robbins v. Lynch*, 936 F.2d 330 (7th Cir. 1988), and the other cases cited in that same "string" cite are all cases in which there was a signed written agreement earlier in time. The language of the Seventh Circuit in those cases finds a course of conduct subsequent to the initial written agreement that creates a binding agreement but that does not support the holding in the instant case, where there is an absence of such earlier written agreement.

7. Petitioner Banner respectfully urges certiorari be granted, as the course of conduct relied upon absent a written agreement fails to satisfy the mandate of Section 302(c)(5)(B).

(Cont'd)
Thus findings of the Magistrate Judge to the contrary at paragraph 11 through 16 pages 26a through 27a and his conclusion at (32a) i.e. relying adversely to Banner's failure to respond to these very Joint Arbitration Decisions which were admitted in Court to be a matter of mistaken identity cannot be relied upon.

On a single occasion set forth at page 4 (4a) of the Slip Opinion Banner acceded to a Union audit is an example of another "isolated" incident. The final "isolated" incident recited by the Court of Appeals is Banner's agreement to donate a truck and driver to assist Local 21 in a matter involving another employer at the General Jones Armory.

Thus the only arguable course of conduct is Banner's monthly payment to the Funds under coercion absent a "written agreement".

II. There Is A Clear Conflict With The Second Circuit

8. The Decision of the Court below is in conflict with the Decision of the Second Circuit in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 89 S. Ct. 1193 (March 24, 1969). The Second Circuit in *Moglia* recognized that ". . . receipt of such payments by an employee representative are absolutely prohibited unless there is a "written agreement" between the employer and the union which specifies the basis upon which the payments are made, 403 F.2d at 116 and *Moglia* goes on to conclude:

> Absent the written agreement, there is no valid Section 302 trust as to those employer contributions; the parties making and accepting such contributions are violating Section 302 and the intended beneficiary of the illegal contributions has no legal rights under Section 302 to benefits normally derived from employer contributions to the trust funds.

403 F.2d at 116. Even the Seventh Circuit acknowledged in *Moriarty v. Lewis Funeral Directors*, 150 F.3d 773 at 766:

> If . . . the contributions made on the Lewis' behalf are unlawful for lack of a contribution agreement (as mandated by Section 302(c)(5)(B)) they must be returned and the pension credits to the Lewis' account cancelled.

9. Petitioner respectfully asks the Court to grant certiorari not only because of the clear conflict in the Circuits but because of the overriding importance of this issue coming up time and again throughout the country as evidenced by the substantial number of cases, even cited in the Decision of the Seventh Circuit below that deal with this issue. We

respectfully suggest the Seventh Circuit has made dead letter of the mandatory language of Section 302(c)(5) in inferring a course of conduct absent a "written agreement".

III. All Relevant Facts Were Stipulated

10. The Trial before Magistrate Judge Ashman in the instant case occurred on a single day and was largely based upon a Stipulation of Fact between the parties attached as Appendix D to this Petition and the testimony of Charles R. Ciancanelli the President of Banner Restorations, Inc. and the testimony of his son the Construction Manager of the Petitioner. The Respondent Trust Fund put on no witnesses and relied only on the Stipulations of Fact and Respondents Exhibits introduced as part of the Pre-Trial Order.

11. The Stipulation was first tendered to Banner in Open Court by the Defendant (Respondent) prior to the taking of any testimony and after it was shown to Banner certain paragraphs were stricken and the parties initialed the deletions at each paragraph, (see paragraph 17 and part of paragraph 18 (43a), and written inserts such as paragraph 23 (44a)). We respectfully suggest that the Stipulation of Facts is the most significant part of this record because the Trial Judge discredited that the reason payments were made for a seven year period was due to coercion at the beginning of each job prior to the making of such payments. There was no testimony to the contrary. Paragraph 10 of the Stipulation makes clear that: ". . . Banner did not sign the Memorandum or Understanding or other Collective Bargaining Agreement with the District Council of Bricklayers Local 21. (41a)" (The relevant labor organization that is Third Party Beneficiaries of Respondent Pension Trust Fund) No claim was made by the Respondents that references in paragraphs 8 and 9 (41a) of the Stipulations referring to another Banner

Restorations, a sole proprietorship owned by Irwin Axelrod had any bearing on this case (41a). Nor was there any claim that Banner Restorations the Petitioner here, was a successor employer or in any way involved with the Banner-Axelrod company. A Pre-Hire Agreement with the Banner-Axelrod Company a sole proprietorship, was initially attached to the Complaint but abandoned as a basis for a "written agreement" here, at time of Trial. The references in paragraphs 11, 12, 13, 14 (App. D, 41a & 42a) relate to instances of Banner erroneously being called to an Arbitration Hearing involving the Banner-Axelrod Company, pursuant to arbitration provisions in the Banner-Axelrod Collective Bargaining Agreement which Petitioner Banner never assented to and to which it was a total stranger (41a, 42a). Moreover, those Hearings had to do with a labor organization other than Local 21. Petitioner Banner appeared at such Hearing only for the purpose of denying it was a signatory contractor and was wrongly served with papers, as it was a total stranger. The record evidence stipulated concerning those Hearings supports evidence of Banner's "Special Appearance" to deny jurisdiction over it by that Arbitration Panel.[6]

---

6. After hearing testimony in Open Court during the Trial of this case Counsel for Respondent Ms. Brannigan agreed that the District Council and the Unions which brought Petitioner Banner before them and issued the Arbitration Order asking Banner to make payments had the wrong Banner Restorations. The Court: (stated to Ms. Brannigan)

> Did your client confuse and make an error in that they thought that this Defendant here was Banner Restorations on a contract signed by Axelrod, and did your client make that error?

Ms. Brannigan:

> My clients believed that Banner Restorations, Inc. and Charles Ciancanelli were one in and the same as Banner Restorations.

(Cont'd)

12. Paragraph 17 of the Stipulation was stricken (43a). This striking on the face of the Stipulation is consistent with the finding of Magistrate Judge Ashman in footnote 4 of his Decision that such a document was never produced (31a). A signed contribution report of any kind was never produced. The striking of this paragraph 17 of the Stipulations is also consistent with the language of the Seventh Circuit in footnote 3 of the Slip Opinion acknowledging the erroneous claim of the Respondent Funds trying to resurrect the existence of a signed certification (10a).

13. The stricken sentence in paragraph 19 (43a) of the Stipulation that each employee of Banner was a member of Local 21, is consistent with the testimony of Charles Ciancanelli, Jr. that the Union at no time represented a majority of Banner's employees, and such testimony is consistent with Banner never having signed an agreement that the Union Represented a majority of its employees.

14. The coercion visited upon Banner at each job site is acknowledged in paragraph 23 of the Stipulation (44a). Credibility findings to the contrary, are contrary to the record.[7] Paragraphs 23 of the Stipulation of Fact states Mr. Ciancanelli, the President of the company was told:

(Cont'd)

The Court says:

Okay. They don't still think the same do they?

Ms. Branningan:

No.

Official Transcript of Proceedings of June 22, 2002, Transcript Page 105 Line 22 - Transcript Page 106 Line 5.

7. The Court of Appeals below is in error in its footnote 5 (12a) taking issue with Banner's efforts to distinguish the District Court's (Cont'd)

> That . . . he had to hire members of Local 21, had to pay the employees the contract wage rates, and had to contribute to the Funds on the employees behalf. Ciancanelli was told that if he did not do so the Union Representative would shut the job down and Local 21 would picket the job site.

(This in fact occurred at the 1000 Lake Shore Drive job site.) In addition to the above it was handwritten into the Stipulations and signed by the parties that:

> Ciancanelli states that they also said he had to sign an agreement which he refused to do.[8]

(Cont'd)

credibility finding for suggesting that Stipulation No. 29 (46a) does not on its face refute the credibility determination of the Magistrate Judge. When he held that he cannot believe . . . "that Ciancanelli as President (of Petitioner) made the monthly contributions to Respondent Funds *solely* in response to Local 21's threats of work stoppages and pickets . . .", (27a) Banner in good faith believed that all Stipulations of Fact agreed upon were determinative of those facts. (*See* footnote 8 *infra* for further explanation of same).

8. The circumstances surrounding the preparation of the Stipulations of Facts are set forth in Appendix D Footnote 1 (39a), Footnote 2 (43a) and Footnote 3 (44a) prepared by Petitioner.

The Form of the Stipulation in Stipulation No. 23 (44a) was drafted by Respondent's Counsel, The last line which states "Ciancanelli "states" that they also said he had to sign an agreement which he refused to do". Similar language was drafted by Respondent's Counsel in Stipulation No. 29 (46a) which starts with the words "Ciancanelli "asserts" . . .". We ask that this language be read together with other Stipulations of Fact that do not use the term "asserts" or "states", but favor Respondents Facts. Both parties stipulated to the correctness of each Statement of Fact as Facts not assertions or statements of that party otherwise a Stipulation of Fact would not be a Stipulation of Fact.

The Stipulation in paragraph 25 recites that Marinopoulos who was the President of the Union and a Trust Fund Representative "asked him to sign a Collective Bargaining Agreement which Ciancanelli refused ... (45a)"

15. Most importantly the Stipulation sets forth that Banner Restorations in paragraph 29 "submitted the monthly contribution reports and contacted Local 21 or the Local 21 Apprenticeship Training Funds for workers in response to threats by Local 21 Representatives to shut his job down if he did not do so (46a).

16. We respectfully suggest that in view of these matters having been stipulated to by the parties the fact that the Magistrate Judge chose not to credit the testimony of Mr. Ciancanelli and his job site Manager-son cannot be determinative. Their testimony only elaborated the matters contained in the Stipulation of Fact.

IV. The Seventh Circuit Erroneously Relied Upon A Course of Conduct To Support An Agreement In Reliance Upon Cases In Which There Was An Earlier "Written Agreement"

17. The Seventh Circuit erroneously relies upon *Robbins v. Lynch*, 836 F.2d 330 (7th Cir.) at 13a of its Opinion, which was predicated upon the employer there having earlier in time entered into a "written agreement". In *Robbins* the employer and the Union had earlier signed an actual agreement. In these circumstances finding that a threat to strike is not a defense in not apposite.

18. The Seventh Circuit erroneously relies upon *Robbins v. Lynch* at 13a of its Opinion in its effort to support its theory that conduct manifesting an intent to be bound can be drawn from a seven year period of contribution to the Funds, as

sufficient even absent entry or assent at any time to a "written agreement (13a)". We respectfully suggest in the circumstances where there is an absence of a "written agreement" at any time, the threats stipulated to here, in stipulation of Fact No. 29 (46a) as the reason for making such payments is a totally different circumstance than in *Robbins v. Lynch.* The mandate of Section 302(c)(5)(B) that there be a "written agreement" has clearly not been followed. The cases the Seventh Circuit has relied upon inferring the existence of such agreement are all cases where there was a written agreement at some earlier point in time in the case and the enforcement in *Robbins v. Lynch* of the contract was at a time subsequent to the earlier agreement.

19. In *Robbins v. Lynch*, Lynch Truck Service signed the National Master Collective Bargaining Agreement with the Teamsters in 1975 when it entered the business. The agreement expired in 1976 at which time Lynch executed a further agreement through the promise to be bound by any agreement thereafter included by the Local employer bargaining group. *Robbins*, 836 F.2d 330 at 331.

20. As the agreement was going to expire on April 1, 1979, Lynch sent a letter on March 29 to further adhere to the next National Agreement. Subsequently Lynch sent a letter indicating its desire to terminate the agreement but the Health and Welfare Funds continued to keep Lynch's employees on their rolls. (*Robbins*, 836 F.2d at 332) Lynch's defense to the Funds ERISA action was that it never signed the 1982 agreement, a subsequent agreement; that however, is a totally different circumstance than the facts in the instant case, where there never was a "written agreement" of any kind. *Lynch* as part of its defense alleged that the Union had threatened to strike if he did not include certain employees within the Pension Fund Contract. We suggest a threat to

strike when there is an ongoing labor relationship is totally different than a threat to shut a company down when they are total strangers as Banner is here, as it never assented to a "written agreement" and specifically refusing to sign an agreement when it was requested to do so. (*See* Stipulation of Fact No. 23, 44a).[9]

21. The facts in *Robbins v. Lynch* are typical of the facts in *Gariup v. Birchler* where there similarly was a prior written agreement. 777 F.2d 370 (7th Cir. 1985), and similarly in *Moriarty v. Larry G. Lewis*, 150 F. 3d 773, and *Operating Engineers Local 139 v. Gustafson Construction Corp.*, 258 F.3d 645 (7th Cir. 2001) The distinction that the Court below failed to acknowledge in attempting to distinguish *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 398 US 919, 89 S. Ct. 1193, 22 L. Ed. 2d 453, (1969) was its refusal to distinguish or acknowledge that its own *Gariup v. Birchler* decision 773 F.3d 370 at 375 (7th Cir. 1985)

---

9. In the instant case as stipulated in paragraph 23 of the Stipulation (44a) and paragraph 25 of the Stipulation (45a) the coercion to obtain an agreement would have been an agreement only condoned under Section 8(f) of the Labor Act in the absence of the Union representing a majority of the Petitioner's employees. In *NLRB v. Ironworkers Local 103 (Higdon)* 434 U.S. 335, 54 L. Ed. 2d 586, 98 S.Ct. 651 (1973) the Court held:

> Congress was careful to make its intention clear that pre-hire agreements were to be arrived at voluntarily and no element of coercion has to be admitted into the narrow exception being established by the majority principle . . . nor was it the intention of the committee to authorize a labor organization to strike, picket or otherwise coerce an employer to sign a pre-hire agreement as the majority status had not been established.

434 U.S. 348.

acknowledged that it agreed with the result in *Moglia* where the employer was making contributions to a pension fund that had failed to execute any type of written agreement evidencing its intent to be bound to a trust agreement. The Seventh in *Gariup v. Bichler* stated:

> We have no quarrel with the *Moglia* result however; the facts in *Moglia* are not similar to the facts in this case. In *Moglia* the court noted that the employer "had *never* entered into a collective bargaining agreement or a pension trust although the local had often requested it to do so.

Moglia, 403 F.2d at 114 emphasis in original quote *Gariup v. Birchler*, 777 F.3d 273. Thus we see that the Seventh Circuit in *Birchler* acknowledges the critical difference and why we ask this Court to accept the instant case for review in view of the conflict in the Circuits between this case and *Moglia*.

V. Balancing of Equities For Return of Funds Is Not Required in the Absence of A "Written Agreement"

22. We further respectfully suggest that consistent with the above holding in *Moglia* in circumstances where there never was a written agreement, as in the case at bar, the traditional equity balancing required in *UIU Trust* by the Seventh Circuit and by the Magistrate Judge below should not be applicable here for that was a circumstance where there was a written agreement the monies simply were deposited by mistake of fact or law and there was a balancing of equities to determine the equities of each side where however the monies are unlawfully kept by the Trust Funds contrary to the clear statutory mandate accordingly such monies simply must be returned.

REASONS FOR GRANTING THE PETITION

23. This case is of imperative public importance as the issue will arise many times in the future and the public policy of the Statute must be vindicated.

24. Review is necessary to resolve a conflict in the Circuits concerning strict construction of the written agreement requirement of Section 302(c)(5)(B).

25. We respectfully suggest that the Writ be granted here because the circumstances confronted by Banner Restorations, Inc. denying it the opportunity of a return of pension monies erroneously paid into the Funds by mistake of fact or law and retained by the Funds in the absence of a written agreement, mandated by Section 302(c)(5)(B) is contrary to the mandatory language of the Statute which this Court has never interpreted.

26. The Statutory mandate of Section 302(c)(5)(B) clearly has been abused by the Pension Funds in the instant case. The effort by the Seventh Circuit's Decision below to claim that a course of conduct can be established merely by the payment of monies for a seven year period into the Funds in the absence of a written agreement between the underlying labor organization that created the Fund obligations and this employer cannot be created on the facts shown here to be a course of conduct sufficient to infer or create an agreement by some sort of ratification.

27. The Decision by the Court below is totally contrary to the Decision of every other Seventh and Second Circuit Decision and extends the Seventh Circuit's Decision such as *Lynch v. Robbins* and *Gariup v. Birchler*, which all are circumstances where there was an earlier agreement at some time. Similarly all Seventh Circuit Decisions that we have

found, that infer a course of conduct are a circumstance where either there was a prior written agreement or the certification on the Monthly Contribution Report that the employer had signed, incorporates a full Collective Bargaining Agreement setting forth all terms and conditions of employment.

28. In the instant case a certification was never signed, an agreement was never entered into and significantly the facts from which the course of conduct is derived that the payments to the Funds coincided with amounts of payments in an area agreement not with Banner, coerced and "extorted" at the beginning of each job fails to meet the "written agreement" requirement in Section 302(c)(5)(B) and the Quid Pro Quo for such coercion has been stipulated to. (Stip. 25, 46a).

29. In *United States v. Gruttadauro*, 815 at 818 F.2d 1323 (7th Cir. 1987) the Seventh Circuit albeit in a criminal context affirmed a decision finding a Union Business Agent guilty of willfully receiving monies from an employer in violation of 29 U.S.C. § 186(b)(1)(d) (1982) a part of the same Section 302 involved here. In the *Gruttadauro* case similarly there never was a "written agreement". Hach the contractor in the *Gruttadauro* case, was similarly engaged in the concrete restoration business as is Banner in the instant case. *Gruttadauro* was a Laborer's Union Business Agent. Hach In the *Gruttaduro* case, like Ciancanelli in the instant case was asked to employ union members even though he had no contract to do so. The Court makes its Decision affirming a violation of Section 302 on its finding that:

> The record supports the government's position that *Gruttadauro* knew Hach's employees were not union members and that they never intended to be, moreover the jury reasonably could have found that given Gruttadauro's experience as a

> union business agent in the four acts charged in the indictment Gruttaduro' defense that he was fooled by Hach was not credible.

818 F.2d 1323 at 1329.

30. The overriding policies prohibiting the kind of conduct specifically mandated in Section 302(c) that if a written agreement is required with a labor organization before even dues monies or trust fund monies can be collected is equally applicable and equally serious and must be equally enforced in the circumstances of this case.

31. The public policy of the United States in this Statute articulated by this Court *Arroyo v. United States*, 359 U.S. 419 (1959) must be followed. The Court below in its Slip Opinion (14a, 15a) acknowledges the public policy of the United States expressed in the *Arroyo* decision.

32. The policy concerns of Section 302 being strictly enforced include concerns of "extortion by employee representatives" 359 U.S. 419, 425 to 426. We respectfully suggest that the Stipulated Facts in this case including threats made here that the job would be shut down, if payments were not made, notwithstanding the absence of a "written agreement" are akin to extortion and therefore violative of the public policies underlying the Statute as found by this Court in *Arroyo*. As in *Arroyo* the facts here are similarly undisputed.

33. The public policy concerns enforcing this Statute with the large number of cases which come up in every single jurisdiction concerning the "written agreement" mandate in Section 302(c) cries out for the granting of review. The court in *Arroyo* recognized that Congress in enacting Section 302 was attempting to deal with problems "peculiar" to Collective

Bargaining Agreements and the Federal Labor policy in light of experience acquired since the passage of the Wagner Act. 359 U.S. 419 L. Ed. 2d 915 79 S. Ct. 864 at 424 359 U.S. 424. Here rather than the special problems dealt with in *Arroyo* we have a situation where the Trust Funds have blatantly violated the statutory mandate and have not even introduced the Trust Indenture document which would clearly spell out the fact that such monies could not be obtained or retained from an employer absent a written collective bargaining agreement with that employer.

34. As in *Moglia* the monies here were kept improperly by the Trust Fund which must be presumed to know the law.

35. We respectfully suggest that monies absent a "written agreement", just as the Second Circuit held in *Moglia* cannot be retained and must be returned under the clear policy of Section 302(c)(5)(B), and the common law cause of action of restitution requires the same. *Arroyo* was concerned about monies being taken into the Funds "without specificity of the benefits payable thereunder". 359 U.S. 419 at 425 This case deals with the question of the return of the monies kept improperly. In either case the concern of improper use of the monies and alleged coercion in the nature of extortion to obtain it is contrary to the statutory mandate.

36. In *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968) a widow attempted to recover pension funds to which her husband would have been entitled because his employer contributed to the relevant fund for over 28 years. The Second Circuit held in *Moglia* that no recovery was possible because there was not the "requisite signed written agreement" under Section 302(a)(b) of the Labor Act. 403 F.2d 110, 113.

37. In the *Moglia* case the processing of the pension fund contribution request for the first time lead the Funds to investigate the eligibility for receipt of payment. The issue presented to the Second Circuit essentially was whether there was an entitlement to benefits by the widow absent a written agreement. The Second Circuit held that in light of Congress' clear intent set forth at 403 F.2d 116 and 118 that it was required under Section 302 that there exist a written agreement in order for the Trust Fund to be properly administered and in order for any monies to be paid out by a Pension Fund notwithstanding prior contributions.

38. The Second Circuit in *Moglia* did consider whether a written agreement could be inferred citing to *William Dunbar Co. v Painters and Glazers District Council*, 129 F. Supp. 417 (D.D.C. 1955) there such agreement in fact existed in the form of an unsigned Collective Bargaining Agreement which was attached to an unsigned Trust Agreement covering the Fund. In that matter according to the Appellant in that case the conduct and actions in observing the terms of the Collective Bargaining Agreement much like the position taken by the Court below here was tantamount to ratification and adoption of a written agreement, the Second Circuit did not agree. 403 F.2d 110-118 In *Dunbar* much like the analysis in *Gariup v. Birchler* the Second Circuit found as a fact that previously there had been a Trust Agreement and a signed copy of an agreement existed but the agreement had simply disappeared and could not be located, that was a circumstance that was distinguishable from the case in *Moglia* where there never was a signed written agreement. Accordingly, the Second Circuit held that where there was once an agreement as in the *Dunbar* case. Section 302(c)(5)(B) only required a written agreement and not a signed agreement and as there clearly was a written

agreement earlier in time that was sufficient. We ask this Court to come back to that same understanding as the Second Circuit correctly held in conflict with the Decision of the Seventh Circuit in the instant case.

39. In dealing with the *Dunbar* matter the Second Circuit correctly held:

> . . . ratification and adoption are only forms of acceptance of a contract and must conform to the general principles governing the formation of contracts. Two essential elements of contract formation are mutuality of agreement and mutuality of obligation. (See generally 7 CJS Contracts Section 1(1) (1962) (*Moglia v. Geoghegan* 403 F.2d 110, 118 (2nd Cir. 1968).

40. The Seventh Circuit Court below speaks of "a course of conduct" rather than adoption or ratification, we respectfully suggest it is doing the same thing that the Second Circuit specifically refused to do in analyzing a circumstance such as the one in the *Dunbar* case. It is also the same distinction we respectfully suggest that the Seventh Circuit had previously correctly made in *Gariup v. Birchler* showing a distinction between circumstance where there was an earlier signed agreement from circumstances where there never was an agreement. Significantly, the Seventh Circuit correctly held Section 302 required the return of monies by the Funds in circumstances where there never was a written agreement. (*See Moriarty v. Larry G. Lewis Funeral Directors Ltd., supra*, 150 F.3d 773 at 766).

41. We acknowledge that there is no requirement that the written agreement be a signed written agreement, but the written agreement does have to be with the employer of the

employees involved and there is no such written agreement here. A Court cannot simply accept as a written agreement an area agreement that is entered into by other employers or a multi-employer group with a labor organization but which this employer specifically refused to sign.

42. The Seventh Circuit below as did the District Court in the instant case, seems to believed that *Brown v. C. Volante Corp.*, 194 F.3d 351, 354-356 (2d Cir. 1999) holding that the conduct of an employer who did not sign two subsequent collective bargaining agreements but paid contributions and wages had rates prescribed by those agreements manifested an intent to adopt unsigned agreements. Slip Opinion (9a). *Brown*, however, we respectfully suggest for the very reasons cited is totally distinguishable from *Moglia* where there never was a written agreement and therefore cannot be held in any way to reverse or diminish the holding of *Moglia*. In the Second Circuit *Brown* is simply consistent with *Gariup v. Birchler* and *Robbins v. Lynch* where there likewise was an earlier written agreement.

43. The Court below erroneously attempts to use *Brown* as distinguishing *Moglia* (see end of footnote 8 on page 17 of its Decision addressing the question of the signature requirement) (18a).

44. The Seventh Circuit below seems to rely in large measure on the issue presented by Chief Judge Winter in *Brown v. Volante* as being authority for their Decision. However, the issue presented there is "whether Appellant manifested its intent to adopt the unsigned collective bargaining agreements" 194 F.3d 351 at 352. *Brown* contrary to Banner in the instant case in fact was signatory to a Collective Bargaining Agreement from July 1, 1987 to June 30, 1990 however did not sign two subsequent collective

bargaining agreements governing the period July 1, 1990 to June 30, 1996, *Brown* 194, 352 at 353. Moreover significantly in *Brown* identical to the language cited earlier in *Moriarty v. Lewis Funeral Directors, supra* had signed a certification which stated they were 'In accordance with the terms of the standard industry agreement with Local 282 IBT." That is language that is totally absent in the certification here. Moreover the certification here was never signed by Banner.

45. Most significantly in *Brown* contrary to the holding of the Court of Appeals below, Judge Winter in the *Brown* Decision in footnote 1 clearly distinguishes *Brown* from the Second Circuit's earlier Decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968) holding that *Brown*:

> Is not contrary to *Moglia.* There, in (*Moglia*) we held that an unsigned, written agreement between a Union and a Fund did not comply with Section 302(c)(5)(B) when the Union and the Trust Fund "never had a signed collective bargaining agreement detailing the basis upon which the payments were to be made." 403 F.2d at 114, 115. We rejected a putative beneficiary's argument that its employer adopted the unsigned agreement on the facts of that case, the employer "did not appear to be willing to accept the terms of the unsigned collective bargaining agreement at any time" Id. at 118 we did not, however graft a signature requirement under Section 302(c)(5)(B) unlike the employer in *Moglia* Appellant's conduct manifested an intent to adopt the terms of the unsigned cbas.

We respectfully suggest that like in *Moglia*, Banner has never signed an agreement of any kind or adopted in any way, the

written agreement. The terms of the certifications were never signed, the terms of the certification did not include a detailed agreement and most significantly the payments were made under duress in the nature of extortion so Banner could keep working without the Funds going to the building representative to advise that Banner had to be removed from the job as it was not a union signatory contractor.

46. The language of Section 302(c)(5)(B) mandates a written agreement. There cannot be an inference of an agreement from a course of conduct which does not include assent to all the terms of an agreement for the employer's employees. The Decision in the instant case conflicts with the Second Circuit's Decision in *Moglia* which spells out the limited circumstances when an agreement can be inferred. It must be limited to circumstances where there was a prior "written agreement" To permit a course of conduct beyond that circumstance invites problems of extortion addressed by this Court in *Arroyo v. United States.*[10]

---

10. While Petitioner respectfully urges in support of question presented No. 3 that the affirmance of the District Court's credibility resolution is in error, alternatively we ask the Court to grant review notwithstanding the question of coercion, as the clear language of Section 302(c)(5)(B) that mandates a written agreement is a policy question of such overriding importance and upon which there is a clear conflict in the Circuits.

CONCLUSION

For all the aforesaid reasons Petitioner respectfully request that the Supreme Court grant Certiorari.

Respectfully submitted,

GERARD C. SMETANA*
SMETANA & AVAKIAN
39 S. LaSalle Street
Suite 1218
Chicago, IL 60603
(312) 357-0250

Attorneys for Petitioner

* *Counsel of Record*

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED SEPTEMBER 22, 2004

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 02-3512

BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM and Masonry Institute, Bricklayers Local 21 Pension Fund,

Plaintiffs-Appellees,

v.

BANNER RESTORATION, INCORPORATED,

Defendant-Appellant.

Argued May 28, 2004—Decided September 22, 2004

Before BAUER, RIPPLE and ROVNER, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The plaintiffs brought this action to compel an audit of Banner Restoration, Incorporated ("Banner") to determine ERISA compliance. Banner filed a counterclaim, seeking a refund of prior payments. After a bench trial, the district court ordered an audit and denied Banner's counterclaim. Banner timely appealed. For the following reasons, we affirm the judgment of the district court.

Appendix A

I

BACKGROUND

A. Facts

The present dispute involves trust fund litigation to ensure that an employer has paid all required fringe benefit contributions. The employer, Banner, is an Illinois corporation that performs concrete and masonry restoration work. The plaintiff trust funds, collectively referred to as "the Funds," were established pursuant to a collective bargaining agreement ("the CBA") entered into by Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen ("the Bricklayers") and various other parties.

Since 1991, Charles Ciancanelli has been the president of Banner. As president of Banner, Ciancanelli would call Bricklayer's Local 21 ("Local 21") or Local 21's Apprenticeship and Training Program, at least four times per year, to ascertain if any bricklayers were available to perform work. If bricklayers were available, they would be provided by Local 21.

On several occasions, Local 21 representatives visited Banner's work sites and insisted that Ciancanelli hire Local 21 members, pay union wages and make contributions to the Funds. Ciancanelli asserted that the representatives threatened "shut down" of the job sites or union picketing if Banner would not comply. On one occasion, Ciancanelli was asked to assume responsibility for the wage and benefit

obligations of another employer working at the same job site as Banner. Ciancanelli's son, Charles Ciancanelli, Jr., testified that representatives came to nearly ninety percent of Banner's work sites, demanding that Banner employ Local 21 members. Local 21 representatives also repeatedly requested that Ciancanelli sign the CBA on behalf of Banner, but Ciancanelli never did so.

Despite Ciancanelli's refusal to sign the CBA, Banner operated in a manner consistent with CBA obligations. In particular, from June 1991 through March 1998, Banner submitted monthly fringe benefit contributions and contribution reports to the Funds. The contribution reports noted the names and social security numbers of union and apprentice employees who performed regular and overtime work covered by the CBA. Some of the monthly reports contained the following language:

> I hereby certify that this is a true report of all hours worked by Bricklayers and Bricklayer Apprentices during the month and includes no self-employed persons. The undersigned agrees to the terms of payment to these funds set forth in the current applicable Collective Bargaining Agreement and to the terms of the applicable Trust Agreements, and that dues remitted to District Council # 1 were deducted only from the paychecks of bricklayers and bricklayer apprentices who have authorized such deductions in writing.

R.40 at 2-3.[1] Ciancanelli signed the monthly contribution checks drawn on Banner's various accounts and submitted with the contribution reports. Banner's monthly contributions corresponded with the rates prescribed in memoranda sent by the Bricklayers to Banner and signatories of the CBA. Those memoranda detailed the applicable annual wage and benefit rates required by the CBA.

Banner also remitted union dues on behalf of its employees to Local 21. Moreover, in February 1995, Banner cooperated in a payroll audit by the Funds pursuant to CBA terms. The audit covered April 1, 1992, through December 31, 1994. No delinquencies were found. In 1997, Ciancanelli donated a truck and driver to Local 21's Apprenticeship and Training Program. In May 1998, Local 21 notified Banner that it had failed to remit union dues for one employee, and Banner responded by sending the dues.

In 1997, 1998 and 1999, Banner was notified of hearings before the Joint Arbitration Board of the Bricklayers concerning charges of CBA violations brought by Bricklayers Local No. 14. After each of the three hearings, the Joint Arbitration Board found CBA violations at a job site in Romeoville, Illinois. After the 1999 hearing, the Joint Arbitration Board ordered Banner to pay damages to the Bricklayers. Banner did not challenge any of the Joint Arbitration Board's decisions, nor did it pay damages in accordance with the 1999 order.

---

1. Not all monthly contribution reports contained this language. For a time, Banner submitted its own computer spreadsheets rather than the union-provided forms.

Appendix A

In October 1999, the Funds filed this action seeking a compliance audit of Banner's payroll from January 1, 1995, to the present, alleging that Banner had failed to submit accurate monthly contribution reports and had failed to make required monthly contributions. Banner filed a counterclaim for a refund of the monthly contribution payments it previously had paid the Funds on the ground of mistake of fact or law.

B. District Court Proceedings

The district court held a bench trial. The Funds entered into evidence agreed stipulations of fact and offered exhibits submitted as part of the final pre-trial order; Banner additionally presented the testimony of Ciancanelli and Ciancanelli's son. The Ciancanellis testified that Banner complied with CBA obligations because of union coercion.

In its written findings of fact after the trial, the district court rejected, on credibility grounds, the Ciancanellis' version as to why Banner complied with CBA obligations:

> After review, this Court finds that Ciancanelli, as president of Defendant, did not perform any of the acts narrated above solely in response to Local 21's threats of work stoppages and pickets. This Court finds not credible Ciancanelli's testimony that, as president of Defendant, he sent in the contribution reports, paid union wages and fringe benefit contributions, etc., solely in response to Local 21's threats of work stoppages and pickets considering his demeanor and his son's demeanor

> at trial when testifying on the issue, and considering that he hired employees through Local 21, that Local 21 asked him to assume responsibility for the correct and timely payment of wages and fringe benefit contributions of another employer working at General Jones Armory, that he donated a truck and driver to Local 21's Apprenticeship and Training Program, and that he continued on his course of conduct for approximately seven years without complaining to any agency or similar authority, even in the face of three adverse decisions and an order to pay damages by the Joint Arbitration Board.

R.40 at 5-6 (footnotes omitted). The court thus rejected Banner's position that it paid monthly contributions only as a result of union coercion.

The court then determined that Banner had adopted the CBA through its course of conduct:

> namely, its continuous submission of contribution reports to Plaintiffs, its adherence to the wage and fringe benefit contribution rates prescribed by the Collective Bargaining Agreement when making such payments and contributions, its practice of remitting union dues on behalf of its employees to Local 21, and its complete cooperation in the 1995 payroll audit, which revealed no delinquencies.

R.40 at 8. Moreover, the court concluded that the contributions were made according to the terms of the written CBA, thus satisfying the requirement of section 302(c)(5)(B)

of the Labor Management Relations Act ("the LMRA"), 29 U.S.C. § 186(c)(5)(B), that payments to employee representatives be made only "as specified in a written agreement with the employer." As a result, the court concluded that the Funds were entitled to conduct an audit and that Banner was not entitled to recoup any of the amounts paid to the Funds due to mistake of fact or law. Banner timely appealed.[2]

II

ANALYSIS

A. Standard of Review

Banner brings a variety of legal and factual challenges to the district court's decision. On appeal following a bench trial, we review the district court's conclusions of law de novo and its findings of fact for clear error. *See Petrilli v. Drechsel*, 94 F.3d 325, 329 (7th Cir. 1996). "[O]ne who contends that a finding is clearly erroneous has an exceptionally heavy burden to carry on appeal." *Spurgin-Dienst v. United States*, 359 F.3d 451, 453 (7th Cir. 2004). Additionally, a credibility determination "'can virtually never be clear error.' " *Id.* (quoting *United States v. Archambault*, 62 F.3d 995, 999 (7th Cir. 1995)).

---

2. After Banner filed its notice of appeal, we ordered the parties to file jurisdictional memoranda on the issue of whether the district court had issued a final appealable judgment. Only Banner responded to our order. Having reviewed Banner's submission and the supplements to the record, we conclude that the district court did in fact issue a final order disposing of all claims and that Banner's appeal is not premature.

Appendix A

B. Conduct Manifesting Intent To Be Bound

We begin with the well-established principle " 'that a collective bargaining agreement is not dependent on the reduction to writing of the parties' intention to be bound,' . . . rather '[a]ll that is required is conduct manifesting an intention to abide and be bound by the terms of an agreement.' " *Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 373 (7th Cir. 1985) (quoting *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982));*see also Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 500 n.2 (7th Cir. 1996); *Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645, 650 (7th Cir. 2001); *Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998); *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988).

Prior cases that have held an employer bound to a collective bargaining agreement as a result of conduct have emphasized, among other factors, the payment of union wages, the remission of union dues, the payment of fringe benefit contributions, the existence of other agreements evidencing assent and the submission of the employer to union jurisdiction, such as that created by grievance procedures. *See Robbins*, 836 F.2d at 332 (determining that an employer who promised to abide by but refused to sign a collective bargaining agreement adopted the agreement when it paid the union scale, turned over dues under a checkoff system, negotiated grievances and made some pension and welfare contributions); *Gariup*, 777 F.2d at 376 (indicating that an employer became a party to the collective bargaining agreement when it signed an Assent of Participation form,

returned unsigned Acceptance of Working Agreement forms, made contributions to the pension funds and paid wages at union rates); *Brown v. C. Volante Corp.*, 194 F.3d 351, 354-56 (2d Cir. 1999) (holding that conduct of an employer who did not sign two subsequent collective bargaining agreements but paid contributions and wages at the rates prescribed by those agreements manifested an intent to adopt the unsigned agreements); *see also Operating Eng'rs Local 139 Health Benefit Fund*, 258 F.3d at 650 (indicating that an employer's payment of contributions at the rate provided in a successor contract manifested acceptance). *But see Moglia v. Geoghegan*, 403 F.2d 110, 118 (2d Cir. 1968) (noting the presence of similar factors yet declining to find that employer adopted a collective bargaining agreement). Thus, in analyzing Banner's conduct for evidence of agreement to the CBA, the district court properly looked to these and similar factors.

To the extent that Banner challenges the district court's conclusion that, by its conduct, Banner manifested assent to the CBA, we decline to disturb the district court's judgment. We recognize, as did the district court, that Ciancanelli never signed the CBA on behalf of Banner. Our precedent makes clear, however, that a signature to a collective bargaining agreement is not a prerequisite to finding an employer bound to that agreement. *See Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d at 777 ("[A] signature at the bottom of the collective bargaining agreement itself is unnecessary."); *see also Operating Eng'rs Local 139 Health Benefit Fund*, 258 F.3d at 650 ("Acceptance . . . can be manifested by conduct as well as by words.").

Other factors (to which Banner itself stipulated) demonstrate conduct manifesting assent to the terms of the CBA. For nearly seven years, Banner submitted monthly contribution reports to the Funds. In accordance with those reports, Banner paid fringe benefit contributions to the Funds. The contributions were made according to the rates prescribed by the CBA and were detailed in memoranda sent to signatories of the CBA (and to Banner). Some of the monthly contribution reports contained certification language indicating that the contributions were made pursuant to the obligations of the CBA.[3] Additionally, Banner remitted union

3. The Funds suggest that "[o]n at least one occasion, Ciancanelli personally signed the monthly contribution report." Appellee's Br. at 18. However, they make this contention without record cite in violation of Rule 28(a)(9)(A) of the Federal Rules of Appellate Procedure, and, upon an independent review of the record, we did not discover any signed contribution reports.

The apparent absence of a signature to the certification language, despite the space provided for one, limits, to some degree, the significance of the certification language in this case. We also note, however, that checks signed by Ciancanelli were remitted with the reports. Together, we consider the certification language on the monthly reports and the accompanying payments as entitled to some weight in an analysis of whether Banner's conduct manifested intent to abide by the collective bargaining agreement. *Compare Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645, 650 (7th Cir. 2001) (indicating that signed certification language on monthly remittance reports "was entitled to *some* weight . . . and maybe a lot" in considering whether employer was bound to a collective bargaining agreement) *with Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 668 (7th Cir. 2003) (concluding that, under the circumstances, signed certification language was evidence, but only "weak evidence," that employer considered collective bargaining agreement to be in effect).

dues on behalf of employees and paid wages at the rates prescribed by the CBA. It cooperated in an audit by the Funds in 1995. Moreover, about four times per year, Banner requested bricklayers from Local 21 or its Apprenticeship and Training Program.[4] It donated a truck to Local 21's training program. Finally, Banner took no action to challenge jurisdiction after the Joint Arbitration Board found it guilty of labor violation charges under the CBA brought by another Local in 1997, 1998 and 1999.

Before the district court, Banner attempted to minimize this objective evidence of intent to be bound, characterizing the seven-year course of conduct as the product of coercion. The district court rejected this explanation, largely on credibility grounds. It disbelieved the Ciancanellis' testimony that Banner paid union wages, remitted union dues, made fringe benefit contributions and repeatedly submitted to jurisdictional authority created by the CBA solely because union representatives threatened picketing. We see no reason to reject the court's credibility determination, especially given

---

4. Banner characterizes this factual finding of the district court as clearly erroneous. However, the finding corresponds directly with Agreed Stipulation No. 21:

> At least four to five times per year, Ciancanelli called either or both Local 21 and Local 21 Apprenticeship and Training Program to see if either had any apprentice bricklayers available for work. According to Ciancanelli, Local 21 and the Apprenticeship Program always were cooperative in providing bricklayers, if any were available.

R.50 at 6.

the degree of deference required by the standard of review.[5] *See Spurgin-Dienst*, 359 F.3d at 453.

Nonetheless, even accepting the Ciancanellis' testimony, the Ciancanellis testified that the representatives of the union threatened picketing or "shut down" of jobs. We have

---

5. Banner invites us to reject the district court's credibility determination on the ground that it is contrary to the parties' agreed stipulations. In particular, Banner asserts that the parties stipulated that "Ciancanelli . . . submitted the monthly contribution reports in response to threats . . . to shut his jobs down if he did not do so." Appellant's Br. at 17 n.10.

Banner's purposeful omission is misleading. Stipulation No. 29 actually reads:

> Ciancanelli *asserts* that he submitted the monthly contribution reports and contacted Local 21 and/or the Local 21 Apprenticeship and Training program for workers in response to threats by Local 21 representatives to shut his jobs down if he did not do so.

R.50 at 8 (emphasis added). Thus, Banner's complaint regarding the court's credibility determination rings hollow. That determination was consistent with the agreed stipulations and well within the district court's discretion.

We note further that Ciancanelli's assertion is not supported by objective evidence in the record. For instance, during the seven-year relationship, Banner never complained to an appropriate authority about the alleged acts of the union representatives, nor did it indicate, for instance, on its monthly contribution checks, that it paid the amounts only under protest. For this additional reason, we accept the district court's credibility determination.

indicated, however, that threats to strike do not nullify conduct manifesting assent to a collective bargaining agreement. In *Robbins*, an employer attempted to explain away its compliance with the terms of a collective bargaining agreement, partially on the ground that the union had threatened to strike. *See Robbins*, 836 F.2d at 332. We rejected this excuse:

> Lynch was bound, under the approach of *Gariup*. The threat to strike is unexceptional. Unions frequently decline to work unless the employer adheres to a collective bargaining agreement. The threat of "no agreement, no work" hardly makes adherence to the agreement involuntary, as Lynch supposes. This is the threat, express or implied, of every contractual negotiation. (E.g., "Unless you pay my price, I won't sell you my iron ore.")

Id. at 333. As to the threats of picketing, we note that, during the seven years of allegedly coercive acts by the union, Banner never once complained to the National Labor Relations Board ("NLRB") or any other authority about the union's activities.

In sum, the district court was entitled to conclude that Banner's seven-year course of conduct manifested an intent to be bound to the terms of the CBA. Although Ciancanelli never signed the CBA, the company's regular monthly contributions, payment of union wages, remission of union dues, failure to challenge jurisdictional authority created by the CBA and other activities consistent with the conduct of a signatory constitute acceptance by performance.

C. "Written Agreement" Requirement

Having concluded that Banner's conduct manifested an intent to abide by the terms of the CBA, we next must consider whether Banner's monthly fringe benefit contributions comply with section 302(c)(5) of the LMRA. Section 302 of the LMRA generally forbids employer payments to representatives of employees. *See* 29 U.S.C. § 186(a). However, section 302(c)(5)(B) contains an exception for payments made in conformity with the terms "specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5)(B).[6] Banner argues that the payments it made to the Funds were not made under a "written agreement." On this basis, Banner seeks to avoid any present obligations to the Funds and, in its counterclaim, seeks a refund of the amounts previously paid in monthly contributions to the pension fund.

Section 302 of the LMRA ensures that payments to employee representatives are made for proper purposes. The

---

6. 29 U.S.C. § 186(c) provides in relevant part:

> The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer. . . .

Supreme Court has described the policy concerns that animate section 302:

> Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.
>
> . . . .
>
> Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain.

Arroyo v. United States, 359 U.S. 419, 425-26 (1959); *see also Mazzei v. Rock-N-Around Trucking, Inc.*, 246 F.3d 956, 961 (7th Cir. 2001) (quoting *Arroyo*, 359 U.S. at 425-26); *Gariup*, 777 F.2d at 375 (same). In *Gariup*, we ourselves explained:

> Congress required that a written agreement exist between the employer and the employees' representative governing the rights of employees on whose behalf the contributions were made to ensure "that employee benefit trust funds 'are

> legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them.' "

Gariup, 777 F.2d at 375 (quoting *U.M.W.A. Health & Ret. Funds v. Robinson*, 455 U.S. 562, 570 (1982)). Mindful of these legislative purposes underlying the provision, we consider whether Banner's contribution obligations were "specified in a written agreement with the employer," as required by section 302(c)(5)(B). 29 U.S.C. § 186(c)(5)(B).

We begin with the proposition that "a signed, unexpired collective bargaining agreement between the parties is not required to satisfy section 302(c)(5)(B)." *Gariup*, 777 F.2d at 375; *see Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) ("[A] signature at the bottom of the collective bargaining agreement itself is unnecessary."); *see also Central States, Southeast & Southwest Areas Pension Fund v. Behnke, Inc.*, 883 F.2d 454, 460 (6th Cir. 1989) (indicating that an interim agreement and a participation agreement that incorporated a written trust agreement sufficiently comported with section 302(c)(5)(B)). Indeed, in some situations, even an "expired agreement—one that has no *contractual* force—nevertheless can satisfy the statutory requirements." *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 668 (7th Cir. 2003); *see also Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 883 (9th Cir. 1996) (indicating that a repudiated pre-hire agreement "provides a sufficient safeguard against the illegal payments § 302(c)(5)(B) is intended to prevent"); *Denver Metro. Ass'n of Plumbing, Heating, Cooling Contractors v. Journeyman Plumbers & Gas Fitters Local No. 3*, 586 F.2d 1367, 1373

(10th Cir. 1978) (indicating that an expired collective bargaining agreement and trust agreements incorporated therein satisfy section 302(c)(5)(B) (quoting *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970))); *cf. NLRB v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 864-65 (5th Cir. 1997) (indicating that valid "make whole" remedy ordered by NLRB against successor employer who had not signed a collective bargaining agreement did not offend the policies behind section 302(c)). Thus, obligations have been enforced in a variety of circumstances, absent a signature to a current collective bargaining agreement.

Moreover, section 302(c)(5)(B) does not require a *signed* agreement;[7] it merely requires a "written" one. 29 U.S.C. § 186(c)(5)(B); *see Brown*, 194 F.3d at 355 ("Section

7. We recognize that the existence of a signature to *some* document has been relevant in cases addressing whether an employer is bound to make fringe benefit contributions. *See, e.g., Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 376 (7th Cir. 1982) (citing employer's signature to Assent of Participation form which referenced the unsigned CBA); *Brown v. C. Volante Corp.*, 194 F.3d 351, 353 (2d Cir. 1999) (noting submission of signed contribution reports). Signatures in these cases are certainly relevant to establish the employers' assent to the terms of the agreements upon which they are found. *Cf. Laborers' Pension Fund v. Blackmore Sewer Const., Inc.*, 298 F.3d 600, 606 (7th Cir. 2002) (indicating in the context of a collective bargaining agreement negotiated by a multi-employer association that "[s]igning the final agreement that has been negotiated certainly qualifies as conclusive evidence that the employer intended to be bound"). To the extent signatures are relevant for this purpose, we note Ciancanelli's signature to the monthly contribution checks remitted for nearly seven years. Nonetheless, we emphasize that section 302(c)(5)(B) of the LMRA itself imposes no signature requirement.

302(c)(5)(B) does not require that an agreement be signed, only that it be 'written' and set forth 'a detailed basis on which . . . payments are to be made' to a trust fund."); *Nat'l Leadburners Health & Welfare Fund v. O.G. Kelley & Co.*, 129 F.3d 372, 375 (6th Cir. 1997) ("The statute does not specify any signature requirement and the term 'written agreement' is unambiguous in relation to such.").[8] As our

---

8. Both the Second and the Sixth Circuits have distinguished their prior case law on this issue. In *National Leadburners Health & Welfare Fund v. O.G. Kelley & Co.*, 129 F.3d 372 (6th Cir. 1997), the Sixth Circuit distinguished its prior decision in *Merrimen v. Paul F. Rost Electric, Inc.*, 861 F.2d 135 (6th Cir. 1988). In *Merrimen*, the court had found significant the absence of a signature to the CBA in the context of the section 302(c)(5)(B) analysis. *See id.* at 139. In that case, however, the CBA itself required a signature to a Letter of Assent in order to demonstrate acceptance of the CBA. *See id.* at 136; *see also Nat'l Leadburners Health & Welfare Fund v. O.G. Kelley*, 129 F.3d at 375 (emphasizing this fact). In *National Leadburners Health & Welfare Fund*, the Sixth Circuit distinguished *Merrimen* on that ground and clarified that *Merrimen* "does not impose a statutory signature requirement." *Id.* at 375. The court thus concluded that an employer could be bound by a collective bargaining agreement negotiated by a multi-employer association, despite the absence of that employer's signature to the agreement. *See id.* at 375-76.

Similarly, in *Brown*, 194 F.3d at 351, the Second Circuit distinguished its prior decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968). In *Moglia*, the court had relied partially on the fact that the collective bargaining agreement was unsigned. *See Moglia*, 403 F.2d at 114-15. In *Brown*, however, the court suggested that *Moglia* rested on the absence of conduct manifesting assent to the terms of the agreement. *See Brown*, 194 F.3d at 355 n.1. The court declared: "We did not . . . graft a signature requirement onto Section 302(c)(5)(B)." *Id.*

colleagues in the Sixth Circuit concluded: "[T]he statute is satisfied by a written agreement to which an employer is bound, not a written agreement to which an employer is bound which also carries that employer's signature." *Nat'l Leadburners Health & Welfare Fund*, 129 F.3d at 376.

In the present case, the parties do not dispute that the contributions made by Banner to the Funds were made in accordance with the terms of the written CBA negotiated by the Bricklayers, including Local No. 21. The record indicates that Banner paid the monthly contributions as directed by the memoranda it received; those memoranda detailed the wage and benefit rates required by the CBA. Additionally, the contribution reports submitted by Banner for a time, with its monthly contributions, also referenced the "terms of payment to these funds set forth in the current applicable Collective Bargaining Agreement" and "the terms of the applicable Trust Agreements." R.40 at 2-3.[9] Moreover,

---

9. The Funds invite us on appeal to rely upon the existence of the certification language on some of the monthly contribution reports as a writing sufficient to satisfy section 302(c)(5)(B). *See* Appellee's Br. at 17 ("[T]he language contained within the monthly contribution reports can and should suffice as a written agreement.").

We note for the sake of clarity, however, that section 302(c)(5)(B) requires that the "written agreement" specify the "detailed basis on which such payments are to be made." 29 U.S.C. § 186(c)(5)(B). Certification language, by itself, does not provide the specificity necessary to satisfy section 302(c)(5)(B). However, such certification language is significant, and may be sufficient, to the extent that it *incorporates* other written agreements with the employer—such as a collective bargaining agreement or trust agreements—which do set

(Cont'd)

Banner does not contend that the contributions have been credited to Funds for any improper purpose.

In this case, the existence of a "written agreement," albeit an unsigned one, detailing the terms upon which the fringe benefit contributions were to be made, and Banner's payment of contributions in accordance with that agreement, effectively concludes our inquiry. *See Brown*, 194 F.3d at 355 ("[A]n unsigned, written agreement satisfies Section 302(c)(5)(B)'s 'written agreement' requirement."). Under these particular circumstances, section 302(c)(5)(B) and the policy concerns behind that provision are met because the contributions were made as "specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5)(B). Banner cannot invoke section 302 of the LMRA as a loophole through which to escape obligations to the Funds. *See Gariup*, 777 F.2d at 376 (concluding that the employer's "attempt to use the written agreement requirement of section 302(c)(5)(B) to circumvent its responsibilities under the collective bargaining agreement must fail").

(Cont'd)

forth the "detailed basis" for payments as required by section 302(c)(5)(B). *See Guthart v. White*, 263 F.3d 1099, 1103 (9th Cir. 2001) ("Under the plain words of the statute, any written agreement with the employer can establish an employee's eligibility for Trust benefits, so long as it actually specifies, *directly or by incorporation*, 'the detailed basis' on which contributions are to be made." (emphasis added)); *see also Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) (suggesting significance of certification language); *Operating Eng'rs. Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645, 650 (7th Cir. 2001) (similar).

Having reached this conclusion, we find no error in the district court's disposition of Banner's counterclaim. Banner's contributions were not made in violation of section 302(c)(5)(B) of the LMRA. Thus, Banner is not entitled to a return of its payments on that ground.

Conclusion

We conclude that the district court properly ordered Banner to submit to an audit of its fringe benefit contributions and properly dismissed Banner's counterclaim. For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED SEPTEMBER 3, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 99 C 6633

Magistrate Judge
Martin C. Ashman

MASONRY INSTITUTE, BRICKLAYERS LOCAL 21 PENSION FUND, and **BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM,**

Plaintiffs/Counter-Defendants,

v.

BANNER RESTORATIONS, INC.,
an Illinois Corporation,

Defendant/Counter-Plaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs filed suit against Defendant for failing to submit contribution reports and payments pursuant to the terms of a Collective Bargaining Agreement. Defendant denied that it was bound by the terms of the Collective Bargaining Agreement because it never assented to the terms

of the agreement. In the alternative, Defendant argued that the conduct relied on by Plaintiffs to demonstrate Defendant's adoption of the Collective Bargaining Agreement resulted from coercion, and therefore could not be used to prove Defendants adoption of the agreement. Additionally, Defendant filed a counterclaim against Plaintiffs seeking the return of all monies paid to Plaintiffs from June 1991 through March 1998 due to mistake of fact or law.

On July 22, 2002, this Court held a bench trial. Pursuant to Federal Rule of Civil Procedure 52(a), this Court enters the following findings of fact and conclusions of law after reviewing the parties' submissions and all admissible evidence, and after assessing the credibility of the witnesses.[1]

I. Findings of Fact

1. Plaintiffs were established pursuant to the terms of a Collective Bargaining Agreement entered into between Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen and various parties. The Collective Bargaining Agreement, which incorporates certain trust agreements by reference, sets forth a detailed basis on which contributions to Plaintiffs most be made.

2. Defendant is an Illinois corporation with an office at 2950 West Taylor Street, Chicago, Illinois. Defendant performs concrete and masonry restoration work.

---

1. The parties have consented to have this Court conduct any and all proceedings, including the entry of final judgment. *See* 28 U.S.C. § 636(c); Local R. 73.1(b).

Appendix B

3. Since 1991, Charles Ciancanelli has been the president of Defendant. Ciancanelli joined Bricklayers Local 21, in 1975, and he has paid dues to Local 21 from 1975 through at least July 2000.

4. From June 1991 through March 1998, Defendant submitted monthly fringe benefit contribution reports to Plaintiffs, noting the names and social security numbers of the employees who performed regular and overtime work covered by the Collective Bargaining Agreement. The monthly contribution reports contained the following language:

> I hereby certify that this is a true report of all hours worked by Bricklayers and Bricklayer Apprentices during the month and includes no self-employed persons. The undersigned agrees to the terms of payment to these funds set forth in the current applicable Collective Bargaining Agreement and to the terms of the applicable Trust Agreements, and that dues remitted to District Council #I were deducted only from the paychecks of bricklayers and bricklayer apprentices who have authorized such deductions in writing.

5. Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen sent Defendant and all signatories to the Collective Bargaining Agreement memoranda detailing the applicable wage and benefit rates for the year. For each year, Defendant's contributions corresponded to the rates prescribed in the Collective Bargaining Agreement. Ciancanelli signed the checks drawn on Defendant's various accounts to make the contributions.

Appendix B

6. Defendant also remitted union dues on behalf of its employees to Local 21.

7. At least four times per year, Ciancanelli called either Local 21 or Local 21's Apprenticeship and Training Program to ascertain if any apprentice bricklayers were available for work. According to Ciancanelli, Local 21 and Local 21's Apprenticeship and Training Program were cooperative in providing apprentice bricklayers if any were available,

8. On several occasions, representatives of Local 21 visited Defendant's job sites and told Ciancanelli that Defendant had to hire members of Local 21, had to pay its employees union wages, and had to contribute on behalf of its employees to Plaintiffs. Representatives of Local 21 warned Ciancanelli that if Defendant failed to do this, Defendant's jobs would be shut down or Local 21 would picket Defendant's job sites.

9. On one occasion, a representative of Local 21 met with Ciancanelli and asked him to assume responsibility for the correct and timely payment of wages and fringe benefit contributions of another employer working at the same job site as Defendant.

10. Around February 1995, Defendant cooperated in a payroll audit by Plaintiffs pursuant to the terms of the Collective Bargaining Agreement: The audit covered the period of April 1, 1992, through December 31, 1994. Plaintiffs found no delinquencies.

Appendix B

11. On April 25, 1997, Defendant was notified by letter that the Joint Arbitration Board of the Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen would hold a hearing on May 15, 1997, to allow Defendant to respond to charges filed against it by Bricklayers Local 14. In an undated decision, the Joint Arbitration Board found that Defendant violated certain provisions of the Collective Bargaining Agreement at a job site in Romeoville, Illinois.

12. Ciancanelli, as president of Defendant, donated a truck and driver to Local 21's Apprenticeship and Training Program. On September 8, 1997, Chris Laughlin, the apprentice coordinator of Local 21, wrote a letter to Ciancanelli thanking him for Defendant's donation.

13. In May 1998, Local 21 notified Defendant that it had failed to remit union dues for Gary Lelis, an employee. Defendant responded by remitting union dues for Lelis.

14. On May 6, 1998, Defendant was notified by letter that the Joint Arbitration Board would hold a hearing on May 21, 1998, to allow Defendant to respond to charges filed against it by Bricklayers Local 14. In an undated decision, the Joint Arbitration Board found, once again, that Defendant violated certain provisions of the Collective Bargaining Agreement at a job site in Romeoville, Illinois.

15. On April 13, 1999, Defendant was notified by letter that the Joint Arbitration Board would hold a hearing on April 29, 1999, to allow Defendant to respond to charges filed

against it by Bricklayers Local 14. In an undated decision, the Joint Arbitration Board found, for a third time, that Defendant violated certain provisions of the Collective Bargaining Agreement at a job site in Romeoville, Illinois. This time the Joint Arbitration Board ordered Defendant to pay damages to Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen, Bricklayers local 14, and other parties.

16. Defendant took no action in response to any of the decisions of the Joint Arbitration Board. That is, Defendant did not challenge the adverse decisions of the Joint Arbitration Board, including the decision ordering Defendant to pay damages. Defendant has still not paid damages to anyone in accordance with the Joint Arbitration Board's order.

17. Representatives of Local 21 repeatedly asked Ciancanelli, as president of Defendant, to sign the Collective Bargaining Agreement, but Ciancanelli always refused to sign the agreement. At no time did Ciancanelli, as president of Defendant, sign the Collective Bargaining Agreement.

18. After review, this Court finds that Ciancanelli, as president of Defendant, did not perform any of the acts narrated above solely in response to Local 21's threats of work stoppages and pickets. This Court finds not credible Ciancanelli's testimony that, as president of Defendant, he sent in the contribution reports, paid union wages and fringe benefit contributions, etc., solely in response to Local 21's threats of work stoppages and pickets considering his

demeanor and his son's[2] demeanor at trial when testifying on the issue, and considering that he hired employees through Local 21, that Local 21 asked him to assume responsibility for the correct and timely payment of wages and fringe benefit contributions of another employer working at General Jones Armory, that he donated a truck and driver to Local 21's Apprenticeship and Training Program, and that he continued on his course of conduct for approximately seven years without complaining to any agency or similar authority; even in the face of three adverse decisions and an order to pay damages by the Joint Arbitration Board.[3]

---

2. Ciancanelli's son took the stand at trial to, among other things, corroborate Ciancanelli's testimony on Local 21's alleged "acts of coercion," particularly the link between Local 21's threats of work stoppages and pickets and Defendant's conduct from June 1991 through March 1998.

3. Even assuming some type of link between Local 21's threats of work stoppages and pickets and Defendant's conduct from June 1991 through March 1998 (thereby finding Ciancanelli's and his son's testimony credible to some extent), this Court does not believe that such conduct by Local 21 offers Defendant any solace. Defendant has not explained how Local 21's threats resulted in Defendant's involuntary adherence to The terms of the Collective Bargaining Agreement for approximately seven years and why Defendant had no alternative but to continue adhering to the terms of the Collective Bargaining Agreement for approximately seven years under the circumstances. *See, e.g., Kamerman v. Steinberg*, 891 F.2d 424, 431 (2d. Cir. 1989); *Hart v. Canadian Imperial Bank of Commerce*, 43 F. Supp. 2d 395, 399-400 (S.D.N.Y. 1999) (*quoting Kamerman*, 891 F.2d at 431); *Henderson County Drainage Dist. No. 3 v. United States*, No. 97-821 L, 2002 WL 1772972, at *8 (Fed. Cl. July 30, 2002). On this point, Judge Easterbrook's comments in *Robbins v. Lynch*,

(Cont'd)

Appendix B

II. Conclusions of Law

1. This Court has jurisdiction over this case pursuant to 29 U.S.C. § 1132(e)(1). Accordingly, Defendant's Emergency Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied.

2. Section 186 of Title 29 of the United States Code prohibits payments by employers to labor organizations, employee representatives, or similar parties but not if the payments are made to a trust fund established by the labor organization, employee representative, or similar party for the sole and exclusive benefit of the employees of the employer, provided that, among other things, the payments are held in trust for the purpose of paying for the benefit of employees, and the detailed basis on which the payments are to be made is specified in a written agreement with the employer.

(Cont'd)

836 F.2d 330, 333 (7th Cir. 1988), are noteworthy: "Unions frequently decline to work unless the employer adheres to a collective bargaining agreement. The threat of 'no agreement, no work' hardly makes adherence to the agreement involuntary. . . ."

To the extent Defendant relies on Local 21's threats of work stoppages and pickets to make out a violation of 29 U.S.C. § 158(b), Defendant should have filed a claim before the National Labor Relations Board. *See Marquez v. Screen Actors s Guild Inc.*, 525 U.S. 33, 49-50 (1998); *Brown v. C. Volante Corp.*, 194 F.3d 351, 353-54 (2d Cir. 1999); *see also NLRB v. Dist. 65, Retail, Wholesale & Dep't Store Union*, 375 F.2d 745, 746-47 (2d Cir. 1967); *United Slate, Tile & Composition Roofer, Damp & Waterproof Worker Ass'n, Local No. 36*,172 N.L.R.B. 2248, 2249-51 (1968). The National Labor Relations Board has jurisdiction over such claims.

3. The written agreement required under § 186 need not be signed by the employer. *Brown*, 194 F.3d at 355 ("Section 302(c)(5)(B) does not require that an agreement be signed, only that it be 'written' . . . ."); *Moriarty v Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) ("[A] signature at the bottom of the collective bargaining agreement itself is unnecessary."); *Nat'l Leadburners Health & Welfare Fund v O.G. Kelley & Co.*, 129 F.3d 372, 376 (6th Cir. 1997) ("[T]he statute is satisfied by a written agreement to which an employer is bound, not a written agreement to which an employer is bound which also carries that employer's signature."); *Robbins*, 836 F.2d at 332-33 (finding that the absence of a signed agreement was immaterial); *Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 70, 375-76 (7th Cir. 1985) ("Moglia does not hold that a signed, unexpired collective bargaining agreement must exist to satisfy section 302.").

4. But if the written agreement is unsigned, then it is necessary for the party seeking to enforce the terms of the agreement to show that the employer adopted the agreement by its course of conduct. *Operating Eng'rs local 139 Health Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 650 (7th Cir. 2001) ("Acceptance . . . can be manifested by conduct as well as by words."); *Robbins*, 836 F.2d at 332 ("Employers may adopt a collective bargaining agreement by a course of conduct."); *Laborers' Pension Fund v. E. Guerra Co.*, No. 99 C 4085, 2000 WL 1349148, at *4 (N.D. Ill. Sept. 14, 2000) ("It is well established that an employer can bind itself to a collective bargaining agreement by course of conduct.").

5. The Collective Bargaining Agreement in this case, which incorporates certain trust agreements by reference, satisfies the written agreement requirement of § 186.

6. Although Defendant never signed the Collective Bargaining Agreement, this Court finds that Defendant adopted the terms of the Collective Bargaining Agreement by its course of conduct, namely, its continuous submission of contribution reports to Plaintiffs, its adherence to the wage and fringe benefit contribution rates prescribed by the Collective Bargaining Agreement when making such payments and contributions, its practice of remitting union dues on behalf of its employees to Local 21, and its complete cooperation in the 1995 payroll audit, which revealed no delinquencies.[4] *See Brown*, 194 F.3d at 354-55 (employer submitted sixty-one remittance reports "'in accordance with the terms of' the [collective bargaining agreements]," paid union wages, acknowledged responsibility to the funds, and cooperated in an audit); *Robbins*, 836 F.2d at 332 (employer paid the union scale, turned over dues under a checkoff system, negotiated grievances, and paid some pension and welfare contributions); *Gariup*, 777 F.2d at 376 (employer signed a document agreeing to contribute to the fund, submitted contribution reports, and paid wages at the rate prescribed in the collective bargaining agreement); *Laborers' Pension Fund*, 2000 WL 1349148, at *4 (employer submitted contribution reports indicating that it agreed to be bound by the collective bargaining agreement and made payments to the funds). Ciancanelli's occasional requests for employees from Local 21, Local 21's request of Ciancanelli to assume

4. The March 1992 contribution report, which allegedly contains Ciancanelli's signature, played no part in this decision.

responsibility for the correct and timely payment of wages and fringe benefit contributions of the other employer working at General Jones Armory, Ciancanelli's donation of the truck and driver to Local 21's Apprenticeship and Training Program, and Ciancanelli's response, or rather lack thereof, to three adverse Joint Arbitration Board decisions and one Joint Arbitration Board payment order bolster this conclusion.

7. The fact that Ciancanelli, as president of Defendant, verbally refused to sign the Collective Bargaining Agreement on more than one occasion does not rule out a finding that Defendant adopted the terms of the Collective Bargaining Agreement in light of Defendant's other conduct. *See United States Iran Co. v. NLRB*, 984 F.2d 864, 868-70 (7th Cir. 1993) (answering the question, "How is it ... that an employer can be found to have 'assumed' a contract that it repeatedly told the union it wanted no part of?"); *Digiacinto v. Ameriko-Omserv Corp.*, 59 Cal. App. 4th 629, 637-38 (1997); *Sheriff v. Medel Elec. Co.*, 412 A.2d 38, 42 (D.C. 1980); Restatement (Second) of Contracts § 22 cmt. b, illus. 1 (1981). "Actions speak louder than words." *United States Can Co.*, 984 F.2d at 874 (Will, J., concurring).

8. The fact that Ciancanelli, as president of Defendant, might not have signed any document expressly indicating his intent to bind Defendant to the terms of the Collective Bargaining Agreement does not rule out a finding that Defendant adopted the terms of the Collective Bargaining Agreement in light of Defendant's other conduct. *See Operating Eng'rs Local 139 Health Benefit Fund*, 258 F.3d at 650 ("Acceptance ... can be manifested by conduct as well as by words."); *Nat'l Leadburners Health & Welfare*

Fund, 129 F.3d at 376 ("[T]he statute is satisfied by a written agreement to which an employer is bound, not a written agreement to which an employer is bound which also carries that employer's signature."). An employer can bind itself to a written agreement by conduct alone. *E.g.*, *Robbins*, 836 F.2d at 332.

9. In view of the fact that Defendant adopted the terms of the Collective Bargaining Agreement, this Court rejects Defendant's claim that it is entitled to recoup monies already paid to Plaintiffs due to mistake of fact or law.[5] *See Operating Eng'rs Local 139 Health Benefit Fund*, 258 F.3d at 651-52; *Robbins*, 836 F.2d at 334; *Cooney v. Wiliiam Robinson Dairy Inc.*, 744 F. Supp. 841, 842 (N.D. Ill. 1990); *cf. UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers of Am.*, 998 F.2d 509, 512-13 (7th Cir. 1993) (allowing the union to state a claim for recovery of mistaken payments where an employee, without authorization, instructed the union to increase his contributions); *Plucinski v. I.A.M. Nat'l Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989) ("[I]t would be inequitable to allow the fund to keep money which came its way by honest mistake, for example if the employer miscalculated the amount it owed or if it erroneously believed that it was legally obligated to pay certain monies to the fund.").

---

5. According to Defendant, "[th]e mistake of fact [wa]s that [Ciancanelli] did not know that he had to have a signed contract. The mistake of law was that [Ciancanelli] did not know that it was against the law to make . . . payments [to Plaintiffs in the absence of a written agreement]." (Def.'s Proposed Conclusions of Law ¶ 34.)

10. Pursuant to the terms of the Collective Bargaining Agreement, Plaintiffs are entitled to conduct a payroll audit of Defendant for the period of January 1, 1995, through the present, and to obtain payment of the amount found due and owing, if any.

11. This case is distinguishable from *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), in that here Defendant appeared willing to accept the terms of the Collective Bargaining Agreement by its course of conduct. *Cf id.* at 118 ("Elmhurst did not appear to be willing to accept these terms at any time."); *accord Brown*, 194 F.3d at 355 n.1 (In *Moglia*, "[w]e rejected a putative beneficiary's argument that its employer adopted the unsigned agreement because, on the facts of that case, the employer 'did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time.' ... Unlike the employee in *Moglia*, appellant's conduct [in this case] manifested an intent to adopt the terms of the unsigned CBAs.").

III. Conclusion

For the reasons stated, and based on a preponderance of the evidence adduced at trial, this Court finds in favor of Plaintiffs. Plaintiffs are entitled to conduct a payroll audit of Defendant for the period of January 1, 1995, through the present, and to obtain payment of the amount found due and owing, if any, in accordance with the terms of the Collective Bargaining Agreement. Defendant's Emergency Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied.

s/ Martin C. Ashman
MARTIN C. ASHMAN
United States Magistrate Judge

Dated: September 3, 2002

APPENDIX C — RELEVANT STATUTE

29 U.S.C. § 186

SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

* * *

Appendix C

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include

acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar

payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer,

* * * *

APPENDIX D — STIPULATIONS OF FACT FILED SEPTEMBER 17, 2003

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS F I L E D EASTERN DIVISION

MAGISTRATE JUDGE ASHMAN
No. 99 C 6633

MASONRY INSTITUTE, BRICKLAYERS LOCAL 21 PENSION FUND, and BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM,

Plaintiffs/Counter-Defendants,

v.

BANNER RESTORATION, INC., an Illinois Corporation,

Defendant/Counter-Plaintiff.

STIPULATIONS OF FACT[1]

Plaintiffs, Masonry Institute, Bricklayers Local 21 Pension Fund and Bricklayer Local 21 of Illinois Apprenticeship and Training Program, and defendant, Banner Restorations, Inc., by their respective attorneys, do hereby stipulate and agree as follows:

---

1. Stipulation of Fact prepared by counsel for Masonry Institute Bricklayers Local 21 Pension Fund – Susan Brannigan and tendered in open court on July 22, 2002 just before opening of trial.

Appendix D

1. Plaintiffs, Masonry Institute, Bricklayers Local 21 Pension Fund and Bricklayer Local 21 of Illinois Apprenticeship and Training Program are maintained and administered in accordance with and pursuant to the provisions of §302(c)(5) of the National Labor Relations Act ("NLRA"), as amended, Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001, *et seq.*, and other applicable federal law and are administered pursuant to the terms and provisions of a certain Restated Agreement and Declaration of Trust ("Trust Agreement").

2. Banner Restorations, Inc. ("Banner"), an Illinois corporation with an office located at 2950 West Taylor Street, Chicago, Illinois, was incorporated on October 11, 1991.

3. The president of Banner Restorations, Inc., is and at all times has been Charles Ciancanelli, Sr. ("Ciancanelli").

4. Ciancanelli was president of City Wide Builders, Inc. ("City Wide"), an Illinois corporation. City Wide Builders, Inc., was incorporated on February 9, 1987, and was dissolved involuntarily on July 1, 1997.

5. Banner filed State of Illinois Domestic Corporation Annual Reports for the years 1992 through 1999, each of which was signed by Ciancanelli as president and listed 2900 West Taylor Street, Chicago, IL, 60612, as Ciancanelli's residential address. City Wide filed State of Illinois Domestic Corporation Annual Reports for the years 1988 through 1996, each of which was signed by Ciancanelli as president, and/or Elizabeth Ciancanelli as secretary and identified 2900 West Taylor Street, Chicago, IL 60612, as the address of the corporate directors and officers.

6. Ciancanelli joined Bricklayers Local 21 in about 1975, and at least as of July 2000 was still a dues paying member of Bricklayers Local 21.

7. Ciancanelli worked as a bricklayer for Irwin Axelrod for about 10 years until about 1990.

8. On some unknown date after June 1, 1990, Irwin Axelrod, as president of Banner Restorations, located at 2900 W. Taylor Street, Chicago, IL 60612, signed a Memorandum of Understanding with the Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen ("District Council"). The District Council consists of Local Unions 14, 20, 21, 27, 56, and 74.

9. On May 6, 1991, Irwin Axelrod, as president of Banner Restorations, located at 2900 W. Taylor St., Chicago, IL, signed a Memorandum of Agreement with Pointers, Cleaners and Caulkers Local Union No. 52, of the International Union of Bricklayers and Allied Craftsmen.

10. Ciancanelli, as president of Banner, did not sign a Memorandum of Understanding or other collective bargaining agreement with the District Council or Bricklayers Local 21.

11. Banner was notified, by letter dated April 25, 1997, that a hearing would be held on May 15, 1997, before the Joint Arbitration Board of the District Council and signatory contractor upon charges filed against Banner by Bricklayers Local 14. Following the hearing held on May 15, 1997, the Joint Arbitration Board issued an undated decision, finding

Appendix D

Banner violated certain provisions of the collective bargaining agreement with respect to a job site in Romeoville, IL.

12. Banner was notified, by letter dated May 6, 1998, that a hearing would be held on May 21, 1998, before the Joint Arbitration Board of the District Council and signatory contractor upon charges filed against Banner by Bricklayers Local 14. Following the hearing held on May 21, 1998, the Joint Arbitration Board issued an undated decision, finding Banner violated certain provisions of the collective bargaining agreement with respect to a job site in Romeoville, IL.

13. Banner was notified, by letter dated April 13, 1999, that a hearing would be held on April 29, 1999, before the Joint Arbitration Board of the District Council and signatory contractor upon charges filed against Banner by Bricklayers Local 14. Following the hearing held on April 29, 1999, the Joint Arbitration Board issued an undated decision, finding Banner violated certain provisions of the collective bargaining agreement with respect to a job site in Romeoville, IL. The decision ordered Banner to pay damages to Local 14, Local 14 welfare and other funds, and to the District Council.

14. The decisions in each of the matters identified in paragraphs 11 - 13 stated that "Banner Restorations has a current collective bargaining agreement, which was signed on June 25, 1991 by Irwin [or Erwin] Axelrod."

15. From June 1991 through March 1998, Banner submitted monthly fringe benefits funds contribution reports, noting the names and social security numbers of the employees who performed work covered by the CBA, the regular and overtime hours each worked. With the reports, Banner remitted contributions that were allocated to the health and welfare fund (a/k/a masonry Institute), the pension fund, and the apprenticeship and training program, as reflected on Plaintiffs' Exhibit 18 (A) and (B).

16. Ciancanelli signed the checks drawn on Banners various accounts for the fringe benefits contributions. The checks list Banner's address as 2950 W. Taylor Street, Chicago, IL 60612.

17. ~~Ciancanelli signed the monthly contributions report for March 1992.~~[2] (SB GS)

18. Banner remitted Union dues on behalf of its employees ~~who had authorized the deduction of dues from their paychecks~~. (SB GS)

19. The individuals identified on Plaintiffs' Exhibit 3 were employed by Banner for sometime during the period of June 1991 through March 1998. ~~Each employee was a member of Local 21, as were~~ Ciancanelli, his son, Charles Ciancanelli, Jr., his brother Anthony, and hisnephew Anthony Slavic. (SB GS)

---

2. Items crossed out in paragraph numbers 17, 18 & 19 were crossed out at request of Gerard C. Smetana, Counsel for Banner Restorations, Inc. and initials of Ms. Brannigan and Mr. Smetana were placed in the margin at the crossed out lines - "GS and SB."

Appendix D

20. Banner employed Peter A. Marinopoulos as a bricklayer. Marinopoulos's father, also named Pete, was a business representative with Local 21 and currently is the president of Local 21 and of the District Council.

21. At least four to five times per year,-Ciancanelli called either or both Local 21 and Local 21 Apprenticeship and Training Program to see if either had any apprentice bricklayers available for work. According to Ciancanelli, Local 21 and the Apprenticeship Program always were cooperative in providing bricklayers, if any were available.

22. Chris Laughlin, director of the Local 21 Apprenticeship & Training Program, whom Ciancanelli has known for most of Laughlin's life, wrote Ciancanelli thanking him for Banner's donation of a truck and driver to the program.

23. On a number of occasions over the years at various job sites at which Banner was working, representatives of Local 21, including Vern Gator, Bob Ned, and Bob McCormick, told Ciancanelli he had to hire members of Local 21, had to pay the employees the contract wage rates, and had to contribute to the Funds on the employees' behalf. Ciancanelli was told that if he did not do so, the Union representatives would shut the job down or Local 21 would picket the job site. Ciancanelli states that they also said he had to sign an agreement, which he refused to do.[3] (SB GS)

3. Addition in paragraph 23 is an additional sentence written in by Ms. Brannigan at the request of Mr. Smetana – which states: that they also said that he had to sign an agreement, which he refused to do (such additions are underlined and initialed by counsel.

24. On one occasion, Pete Marinopoulos, then a Local 21 business representative, and Bill McIntyre, a representative of the Masonry Institute, met with Ciancanelli and asked him to assume responsibility for the correct and timely payment of wages and fringe benefits of employees working for another masonry contractor on the General Jones Armory, a public works project in Chicago, IL.

25. Ciancanelli states that Marinopoulos asked him to sign a collective bargaining agreement, which Ciancanelli refused.

26. The District Council sent Banner, as it did its signatory contractors, memoranda detailing the applicable wage and benefits rates for the contract year. Banner's contributions reflected the rates prescribed for each contract year by the unsigned CBAs.

27. Banner previously cooperated with a payroll audit by the Funds' conducted in about February 1995, pursuant to the terms of the CBAs and Trust Agreement. The audit covered the period of April 1, 1992 through December 31, 1994, and found no delinquencies.

28. The monthly contributions report form contains the following certification:

> I HEREBY CERTIFY that this is a true report of all hours worked by Bricklayers and Bricklayer Apprentices during the month and includes no self-employed persons. The undersigned agrees to the terms of payment to these funds set forth in

> the current applicable Collective Bargaining Agreement and to the terms of the applicable Trust Agreements, and that dues remitted to District Council #1 were deducted only from the paychecks of bricklayers and bricklayer apprentices who have authorized such deductions in writing.

29. Ciancanelli asserts that he submitted the monthly contribution reports and contacted Local 21 and/or the Local 21 Apprenticeship and Training program for workers in response to threats by Local 21 representatives to shut his jobs down if he did not do so.[4]

s/ Susan Brannigan
Susan Brannigan
For Plaintiffs
Asher, Gittler, Greenfield
& D'Alba, Ltd.
200 W. Jackson Blvd.
Suite 1900
Chicago, IL 60606
(312) 263-1500

s/ Gerard C. Smetana
Gerard C. Smetana
For Defendant
Smetana & Avakian
39 S. La Salle Street
Suite 1218
Chicago, IL 60603
(312) 357-0250

4. Through inadvertence the Stipulation of Fact was retained by the court, but not officially made a part of the record until September 22, 2003 when it was officially docketed following a motion for leave to file same, by petitions without objection of respondent and so ordered by Magistrate Judge Ashman.

Supreme Court, U.S.
FILED
MAR 25 2005
OFFICE OF THE CLERK

No. 04-1143

In The Supreme Court of the United States

BANNER RESTORATIONS, INC.,

Petitioner,

v.

BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

MARVIN GITTLER*
ROBERT B. GREENBERG
JOEL A. D'ALBA
ASHER, GITTLER, GREENFIELD & D'ALBA, LTD.
Suite 1900
200 W. Jackson Blvd.
Chicago, IL 60606
(312) 263-1500

Of Counsel
STEPHEN J. FEINBERG

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The questions presented in the employer Petitioner Banner Restorations, Inc.'s ("Petitioner" or "Banner") Petition misstate facts which bear on the issues which would be properly before the Court if certiorari were granted. (S.Ct. Rule 15.2) Respondents, Bricklayers Local 21 of Illinois Apprenticeship and Training Program and Masonry Institute Bricklayers Local 21 Pension Fund ("Respondents" or "the Funds"), suggest that accurate and fair statements of the questions presented are:

1. Did the Court of Appeals err in affirming a factual finding of the District Court following a bench trial that the employer Petitioner's claim that it submitted monthly reports and contributions to the Respondents for seven years solely because of union threats and coercion was not credible?

2. Did the Court of Appeals err in affirming the District Court's conclusion that the facts established that Petitioner's conduct manifested intent to be bound to area-wide collective bargaining agreements?

3. Does the proviso of 29 U.S.C. § 186(c)(5)(B) permitting payments by employers to an employee benefit trust fund "[*p*]*rovided* [t]hat . . . the detailed basis on which such payments are to be made is specified in a written agreement with the employer" require an employer's signature on a written agreement.

Petitioner's first question presented assumes that its payments of monthly contributions to the Respondent Pension Fund were "coerced" by threats "to interfere with the business of the employer" made by "Trust Fund Representatives." (Pet., p. *i*) This question assumes *sub silentio*

QUESTIONS PRESENTED – Continued

that the District Court erroneously found "not credible Ciancanelli's testimony that, as President of Defendant, he sent in the contribution reports, paid union wages and fringe benefit contributions, etc., solely in response to Local 21's threats of work stoppages and pickets considering his demeanor and his son's demeanor at trial while testifying on the issue, and considering" numerous other facts. (Pet. App. B, ¶ 18, pp. 27a-28a) The first and fifth questions also respectively misstate that "Trust Fund Representatives" and "Trust Funds" made such threats. The decisions of the courts below, and the parties' Stipulations, all state that threats to strike or picket were made by representatives of Local 21, the labor union, not the Respondent Trust Fund. (Pet. App. A, pp. 2a-3a; Pet. App. B, ¶ 8, p. 25a; Pet. App. D, ¶ 23, p. 44a)

Petitioner's second question posits whether "an area collective bargaining agreement [sic.] . . . manifest an intent to be bound *solely* by making monthly payments to Respondent Trust Funds, in the face of payments being coerced at the beginning of *each* job and in the absence of *any* language on the monthly [contribution] report forms incorporating all the terms of a Collective Bargaining Agreement . . . " (Pet., p. *i*) (Emphasis added) The decisions of the courts below, as well as the parties' Stipulations, all make clear that there were, in addition to making contributions for seven years, numerous other facts to support the conclusion that Respondent manifested an intent to be bound to the area collective bargaining agreement, including but not limited to language on monthly contribution reports stating, among other things, "[t]he undersigned agrees to the terms of payment to these

QUESTIONS PRESENTED – Continued

funds set forth in the current applicable Collective Bargaining Agreement . . . " (Pet. App. A, pp. 2a-5a, 10a-11a; Pet. App. B, ¶s 4, 5, 6, 7, 9-16, pp. 24a-28a; Pet. App. D, ¶s 11-16, 18, 21, 22, 24, 26-28, pp. 41a-46a)[1]

[1] The parties stipulated and the District Court found that "on a number of occasions over the years" Local 21 representatives visited various job sites and told Banner's President that he had to hire union workers, pay contract wage rates and contributions to the Funds. (Pet. App. D, ¶ 23, p. 44a; Pet. App. B, ¶ 8, p. 25a) Petitioner offers no record citation that Local 21 representatives visited "each" job site. The Court of Appeals did, however, acknowledge that Banner's President's son, who the District Court also found not to be a credible witness (*Id.* at ¶ 18, pp. 27a-28a), testified that they came to "nearly ninety per cent" of the work sites. (Pet. App. A, p. 3a)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
I. Petitioner's "Statement Of The Case" Violates Rule 14.1(g)	1
II. The Facts	3
REASONS THE WRIT SHOULD BE DENIED	10
I. Petitioner's "Coercion" Claim Is A Factual Determination Unworthy Of Review	10
II. The Lower Courts' Conclusions That Banner Adopted The Area-Wide Are Supported By A Preponderance of the Evidence	12
III. 29 U.S.C. § 186(c)(5) Does Not Have A Signature Requirement	15
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Arroyo v. United States, 359 U.S. 419 (1959) 17, 18

Brown v. C. Volante Corp., 194 F.3d 351 (2d Cir. 1999) 18, 20

Capitol-Husting Co. v. NLRB, 671 F.2d 237 (7th Cir. 1982) 12

Krichman v. United States, 256 U.S. 363 (1921) 18

Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), *cert. den.*, 394 U.S. 919 (1969) 16, 18, 19, 20

National Leadburners Health & Welfare Fund v. O.G. Kelley & Co., 129 F.3d 372 (6th Cir. 1997) 20

NLRB v. Haberman Const. Co., 641 F.2d 351 (5th Cir. 1981) (*en banc*) 13

NLRB v. Truckdrivers, Chauffeurs & Helpers, 532 F.2d 569 (6th Cir. 1976), *cert. den.*, 429 U.S. 859 (1976) 12

Robbins v. Lynch, 936 F.2d 330 (7th Cir. 1988) 2, 8, 11, 18

United States v. Halseth, 342 U.S. 277 (1952) 18

United States v. Wiltberger, 5 Wheat 76 (1820) 18

STATUTES AND RULES

29 U.S.C. § 186(c)(5) ..... *passim*

29 U.S.C. § 502(e)(1) 3

29 U.S.C. § 502(e)(2) 3

29 U.S.C. § 1132(a)(3) 3

29 U.S.C. § 1132(e)(1) 3

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 1132(e)(2) 3

29 U.S.C. § 1132(g)(2) 3, 19

29 U.S.C. § 1145 3

Rule 10 12

Rule 14.1(g) 1, 3

Rule 14.1(h) 1

Rule 14.4 3

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit on the merits is reported at 385 F.3d 761 (7th Cir. 2004). The slip opinion is attached to the Petition, Appendix A. The Court of Appeals' October 5, 2004 decision denying Petitioner's motion to stay the mandate is reported at 384 F.2d 911 (7th Cir. 2004). The Court of Appeals' January 11, 2005 decision denying Petitioners' motion for reconsideration, construed as a Petition for Rehearing, appears at 2005 U.S. App. LEXIS 579 (7th Cir. 2005). The District Court's September 3, 2002 decision is unreported and is attached as Appendix B to the Petition.

STATEMENT OF THE CASE

I. Petitioner's "Statement Of The Case" Violates Rule 14.1(g)

This Court's Rule 14.1(g) requires the content of a Petition for certiorari to contain "[a] concise statement of the case setting out the facts material to consideration of the questions presented . . . " Respondent respectfully suggests that Petitioner's "Statement of the Case" completely fails to adhere to this Rule. Within its "Statement of the Case," Petitioner makes nothing but arguments, discussing numerous cases (Pet., pp. 4-5, 6, 7, 12, 13, 14, 15), that belong in a Rule 14.1(h) section amplifying the reasons relied on for allowance of the writ.[2] To the extent

[2] For example, Petitioner's Section II of its "Statement of the Case," entitled "There Is A Clear Conflict With The Second Circuit," doesn't mention a single fact or describe a single thing that occurred or

(Continued on following page)

facts are referred to, most appear in footnotes interspersed with Petitioner's arguments, and many facts are offered without any citation to the record.

For example, paragraph 4 of the Petition at pages 3-4 contains these factual representations:

> 4. Trust Fund Representatives engaged in threats and coercion including actual picketing and threats to shut the job down by going to the customers for whom the restoration services were performed, either [sic.] to the building managers or the owners. Threats were for the purpose of requiring Banner to use the union apprentice program (App. D, Stip. 21, 44a) to make monthly contribution reports and send in monthly checks to the Trust Funds (App. D, Stip. 29, 46(a)) . . .

Stipulation 21 at Appendix D, page 44a, states:

> 21. At least four to five times per year, Ciancanelli called either or both Local 21 and Local 21 Apprenticeship and Training Program to see if either had any apprentice bricklayers available for work. According to Ciancanelli, Local 21 and the Apprenticeship Program always were cooperative in providing bricklayers, if any were available.

Stipulation 29 at Appendix D, page 46a, states:

---

was decided by the courts below. (Pet. 7-8) In Section IV, entitled "The Seventh Circuit Erroneously Relied Upon A Course of Conduct To Support An Agreement, *etc.*," there is a reference in footnote 9 on page 14 to, but no description of, a single stipulated fact and the balance of the section discusses in detail *Robbins v. Lynch*, 936 F.2d 330 (7th Cir. 1993), and cites five other decisions.

> 29. Ciancanelli *asserts* that he submitted the monthly contribution reports and contacted Local 21 Apprenticeship and Training program for workers in response to threats by Local 21 representatives to shut his jobs down if he did not do so. (Emphasis added)[3]

There is no record evidence cited by Petitioner to support the statements that "Trust Fund Representatives" or anyone else "engaged in . . . actual picketing," or spoke to "customers," "building managers" or "owners."

Respondent respectfully suggests that even a cursory review of Petitioner's "Statement Of The Case" reveals such total non-compliance with Rule 14.1(g) that the Court may deny the Petition for this reason. Sup. Ct. Rule 14.4

II. The Facts

The Funds brought this action to compel an audit of Banner's books and records pursuant to the provisions of Sections 502(g)(2), (a)(3), and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1132(g)(2), (a)(3), and 1145. Jurisdiction in the District Court was based upon Sections 502(e)(1) and 502(e)(2) of ERISA, 29 U.S.C. Sections 1132(e)(1) and (e)(2). (R.1)

A counterclaim was filed by Banner seeking return of monies paid to the Pension Fund. The counter-claim was

---

[3] This stipulation is at the heart of Petitioner's third question presented which claims error to the Court of Appeals' affirmance of the District Court's credibility determination that Respondent did not contribute to the Funds solely because of threats or coercion discussed *infra*.

brought under federal common law and sought return of monthly pension fund contributions made by Banner for seven years between June 1991 and March 1998 allegedly because of a mistake of fact or law. (R. 18) The alleged mistake of fact was that Banner's President did not know a signed contract was a requirement to make contributions and the alleged mistake of law was that Banner's contributions were allegedly unlawful without a signed written agreement. (Pet. App. B, p. 33a, n.5)

Following a bench trial, on September 3, 2002, the District Court issued written Findings of Fact and Conclusions of Law in favor of the Funds's request for an audit and against Banner on its counterclaim. The District Court held that the Funds were entitled to conduct a payroll audit of Banner's book and records for the period January 1, 1995 through September 3, 2002. (Pet. App. B, pp. 33a, 34a)

Consistent with the Stipulations and documents admitted at trial, the District Court and Seventh Circuit found the Funds were established pursuant to the terms of a collective bargaining agreement ("CBA") entered into between Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsman and various parties, which incorporates Trust Agreements by reference, and which sets forth a detailed basis on which contributions to Respondent Funds must be made. From June 1991 through 1998, Banner submitted checks, signed by its President Charles Ciancanelli ("Ciancanelli"), and unsigned monthly fringe benefit contribution reports to the Funds, with the names and social security numbers of employees performing work covered by the CBA. Each year, Illinois District Council No. 1 sent Banner and all CBA signatories memoranda detailing the wage and

benefit rates for the year. For each year, Banner's contributions corresponded to the rates prescribed in the CBA. Banner also remitted union dues on behalf of its employees to Local 21. Some of the monthly contribution reports contained the following language:

> I hereby certify that this is a true report of all hours worked by Bricklayers and Bricklayer Apprentices during the month and includes no self-employed persons. The undersigned agrees to the terms of payment to these funds set forth in the current applicable Collective Bargaining Agreement and to the terms of the applicable Trust Agreements, and that dues remitted to District Council #1 were deducted only from the paychecks of bricklayers and bricklayer apprentices who have authorized such deductions in writing.

(Pet. App. B, ¶s 1, 4-6, pp. 23a-25a; Pet. App. A, pp. 2a-4a, 10a-11a; Pet. App. D, ¶s 15, 16, 18, 26, 28)

In February 1995, Banner cooperated in a payroll audit by the Funds pursuant to the CBA terms. No delinquencies were found. (Pet. App. B, ¶ 10, p. 25a; Pet. App. A, p. 4a; Pet. App. D, ¶ 27, p. 45a)

About four times per year, Banner requested bricklayers and apprentices from Local 21 and the Apprentice Program and, according to Ciancanelli, the Union and Apprentice Program were cooperative in providing bricklayers. Banner donated a truck and driver to the Apprentice Program in 1997. (Pet. App. B, ¶s 7, 12, pp. 25a, 26a; Pet. App. A, pp. 4a, 11a; Pet. App. D, ¶ 21, 22, pp. 44a, 45a)

In May 1998, Local 21 notified Banner that it had failed to remit union dues for an employee. Banner

responded by remitting the dues. (Pet. App. B, ¶ 14, p. 26a; Pet. App. A, p. 4a)

On several occasions, Local 21 representatives visited Banners job sites and told Ciancanelli that Banner had to hire members of Local 21, pay its employees union wages, and contribute on behalf of its employees to Plaintiffs. Representatives of Local 21 warned Ciancanelli that if Banner failed to do this, Defendant's jobs would be shut down or Local 21 would picket Defendant's job sites. On one occasion, Ciancanelli was asked to assume responsibility for the wage and benefit obligations of another employer working on the same site as Banner. Local 21 representatives repeatedly asked Ciancanelli to sign the CBA, but at no time while he was President, did he do so. (Pet. App. B, ¶s 8, 9, 17, pp. 25a, 26a; Pet. App. A, pp. 2a-3a; Pet. App. D, ¶s 10, 23, 24, pp. 41a, 44a, 45a)

In 1997, 1998 and 1999, Banner was notified of hearings before the Joint Arbitration Board of the Bricklayers concerning charges of CBA violations. After each hearing, the Arbitration Board found CBA violations at a job site in Romeoville, Illinois and, after the 1999 hearing, ordered Banner to pay damages. Banner did not challenge any of the Joint Arbitration Board decisions, nor did it pay damages. (Pet. App. B, ¶s 11, 14, 15, 16, pp. 26a, 27a; Pet. App. A, p. 4a; Pet. App. D, ¶s 11-14, pp. 41a, 42a) At the arbitration and trial, Petitioner Banner Restorations, Inc. argued that it had no relationship to a company known as "Banner Restorations" which was the company named in the arbitration, whose President Irwin Axelrod signed a collective bargaining agreement with Illinois District Council No. 1 on a date after June 1, 1990. Ciancanelli worked for Axelrod for about ten years until 1990. (Pet., p. 9; Pet. App. D, ¶s 7, 8)

Regarding Banner's assertion that he was "coerced" to do the foregoing by threats of strike and pickets, the District Court also made the following factual finding:

> 18. After review, this Court finds that Ciancanelli, as President of Defendant, did not perform any of the acts narrated above solely in response to Local 21's threats of work stoppages and pickets. This Court finds not credible Ciancanelli's testimony that, as President of Defendant, he sent in the contribution reports, paid union wages and fringe benefit contributions, etc., solely in response to Local 21's threats of work stoppages and pickets considering his demeanor and his son's demeanor at trial while testifying on the issue, and considering that he hired employees through Local 21, that Local 21 asked him to assume responsibility for the correct and timely payment of wages and fringe benefit contributions of another employer working at General Jones Armory, that he donated a truck and driver to Local 21's Apprenticeship and Training Program, and that he continued on his course of conduct for approximately seven years without complaining to any agency or similar authority; even in the face of three adverse decisions and an order to pay damages by the Joint Arbitration Board.[3]
>
> [3] Even assuming some type of link between Local 21's threats of work stoppages and pickets and Defendant's conduct from June 1991 through March 1998 (thereby finding Ciancanelli's and his son's testimony credible to some extent), this Court does not believe that such conduct by Local 21 offers Defendant any solace. Defendant has not explained how Local 21's threats resulted in

> Defendant's involuntary adherence to the terms of the Collective Bargaining Agreement for approximately seven years and why Defendant had no alternative but to continue adhering to the terms of the Collective Bargaining Agreement for approximately seven years under the circumstances. (citations omitted) On this point, Judge Easterbrook's comments in *Robbins v. Lynch*, 836 F.2d 330, 333 (7th Cir. 1988), are noteworthy: "Unions frequently decline to work unless the employer adheres to a collective bargaining agreement. The threat of 'no agreement, no work' hardly makes adherence to the agreement involuntary . . . "
>
> To the extent Defendant relies on Local 21's threats of work stoppages and pickets to make out a violation of 29 U.S.C. § 158(b), Defendant should have filed a claim before the National Labor Relations Board. (citations omitted) The National Labor Relations Board has jurisdiction over such claims.

(Pet. App. B, ¶18, pp. 27a-28a) (Footnote 2 omitted)

The District Court concluded that the Funds established that Banner, by its conduct, had adopted the CBA although Banner never signed it. The District Court further ruled that the CBA, which incorporates trust agreements by reference, satisfies the written agreement requirement of 29 U.S.C. § 186(c)(5) and that the "written agreement" required by the statute need not be signed by the employer. (Pet. App. B, pp. 29a-34a)

The Court of Appeals affirmed all of the District Court's legal conclusions on the same grounds as the

District Court. It rejected Banner's contention, made again in this Court in Petitioner's third question presented and reargued in Petitioner's "Statement Of The Case," that "[m]ost importantly, the Stipulation sets forth that Banner Restorations in paragraph 29 "submitted the monthly contribution reports and contacted Local 21 or the Local 21 Apprenticeship Training Funds for workers in response to threats by Local 21 Representatives to shut his job down if he did not do so. (46a)" The Court of Appeals rejected this argument, stating:

> Banner invites us to reject the district court's credibility determination on the ground that it is contrary to the parties agreed stipulations. In particular, Banner asserts that the parties stipulated that "Ciancanelli . . . submitted the monthly contribution reports in response to threats . . . to shut his jobs down if he did not do so." Appellant's Br. at 17, n.10.

Banner's purposeful omission is misleading. Stipulation No. 29 actually reads:

> Ciancanelli *asserts* that he submitted the monthly contribution reports and contacted Local 21 and/or the Local 21 Apprenticeship and Training Program for workers in response to threats by Local 21 representatives to shut his jobs down if he did not do so.

R.50 at 8 (emphasis added). Thus, Banner's complaint regarding the court's credibility determination rings hollow. That determination was consistent with the agreed stipulation and well within the district court's discretion.

> We note further that Ciancanelli's assertion is not supported by objective evidence in the record. For instance, during the seven-year relationship, Banner never complained to an appropriate authority about the alleged acts of the union representatives, nor did it indicate, for instance, on its monthly contribution checks, that it paid the amounts only under protest. For this additional reason, we accept the district court's credibility determination.

(Pet. App. A, p. 12a)

REASONS THE WRIT SHOULD BE DENIED

I. Petitioner's "Coercion" Claim Is A Factual Determination Unworthy Of Review

We turn first to Petitioner's contention that it complied with an area-wide collective bargaining agreement for seven years, paying monthly contributions to the Funds, remitting dues to the Union and hiring union workers because of union "coercion." This argument is based entirely upon the contention that the Funds stipulated to that fact. Banner cites no testimony of Ciancanelli, the President of Banner, or his son, the only persons who testified, to make this argument. The Court of Appeals' response to Banner's "purposeful omission" from Stipulation No. 29 set forth immediately above (Pet. App. A, p. 12a), which is repeated by Banner in its argument to this Court (Pet., ¶ 15, p. 12), says it all and should say enough.

Banner argues in footnotes 7 and 8 of its Petition at pages 10 and 11 that the terms "states" and "asserts" should not mean what they say because "the Form" of

Stipulations No. 23 and 29 "were drafted by Respondent's counsel" and other stipulations which "favor Respondents" do not use the words "asserts" or "states." (Pet., n.8, p. 11) This argument is another "purposeful omission" and also rings hollow. The last sentence of Stipulation No. 23, which reads, "Ciancanelli *states* that [Local 21 representatives] also said he had to sign an agreement, which he refused to do" was "an additional sentence written in . . . at the request of [Petitioner's counsel.]" (Pet. App. D, n.3, p. 44a) Then Petitioner offers more unsupported assertions that "it in good faith believed" all Stipulations were "determinative," and the parties stipulated to each statement as "Facts." (Pet., n.8, p. 11) But the Stipulation's preamble says, the parties "do hereby stipulate and agree *as follows*." (Pet. App. D, p. 39a) (emphasis added) Petitioner's appeal to logic also fails because it does not consider an equally plausible reason – that Petitioner was unable to negotiate a more "determinative" stipulation.

And for the legal reasons stated by both the District Court and the Courts of Appeal, Banner's "coercion" Stipulation No. 29, even if construed as Banner requests, is meaningless in light of objective facts. In *Robbins v. Lynch*, 936 F.2d 330, 333 (7th Cir. 1988), an employer's attempt to explain away its compliance with an unsigned collective bargaining agreement, partially on the ground that the union had threatened to strike, was rejected, the court stating:

> The threat to strike is unexceptional. Unions frequently decline to work unless the employer adheres to the collective bargaining agreement. The threat of "no agreement, no work" hardly makes adherence to the agreement involuntary, as [the employer] suppose. This is the threat, express or

> implied, of every contractual negotiation. (E.g., "Unless you pay my price, I won't sell you my iron ore.")

Both the Court of Appeals and the District Court also noted, with respect to the threat to picket, that Banner never once complained to the National Labor Relations Board or any other authority. (Pet. App. A, p. 13a; Pet. App. B, n.3, p. 28a) Banner responds to neither of these observations in its Petition.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." S.Ct. Rule 10. Petitioner certainly hasn't made much of a case to depart from this principle here.

II. The Lower Courts' Conclusions That Banner Adopted The Area-Wide Are Supported By A Preponderance of the Evidence

Whether or not a collective bargaining agreement has been reached between two parties is a question of fact. *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982); *NLRB v. Truckdrivers, Chauffeurs & Helpers*, 532 F.2d 569, 571 (6th Cir. 1976), *cert. den.*, 429 U.S. 859 (1976). In federal labor law cases not involving § 186(c)(5),

> It is well settled that a union and employer's adoption of a labor contract is not dependent on the reduction to writing of their intention to be bound. See, e.g., *Certified Corp. v. Hawaii Teamsters Local 996*, 597 F.2d 1269, 1272 (9th Cir. 1979); *Warrior Constructors, Inc. v. Operating Engineers Local 926*, 383 F.2d 700, 708 (5th Cir. 1967); *Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952). Instead, what is required is conduct manifesting an intention to abide by the terms of an agreement. See, e.g., *Warrior Constructors*,

> *Inc.*, *supra*, 383 F.2d at 708-09; *NLRB v. George E. Light Boat Storage, Inc.*, 373 F.2d 762, 766 (5th Cir. 1967); *Rabouin*, *supra*, 195 F.2d at 909-10.

NLRB v. Haberman Const. Co., 641 F.2d 351, 355-56 (5th Cir. 1981) (*en banc*) It has also long been the rule in the Seventh Circuit in cases arising under both the NLRA and cases involving § 186(c)(5). (Pet. App. A, p. 8a)

Haberman involved facts as close to this case as is possible. A construction contractor which had never executed a collective bargaining agreement with the union and was not a member of the area-wide contractors association ("AGC") which negotiated the area-wide agreement was found to have adopted the area-wide agreement by its conduct.

> Although the Company never formally executed a collective bargaining agreement with the Union, and despite the fact that respondent was not a member of the AGC, by May 1973 respondent was remunerating its carpenters at the pay scale provided by the Union-AGC contract. Furthermore, when this contract expired on August 31, 1974, and was replaced by a contract effective from September 1, 1974, through March 31, 1977, the Company instituted the new contract's higher wage scale. The Company also submitted payments for its carpenters' benefits to the Union and allowed the employees to maintain a job steward at the worksite.[4]

Haberman, 641 F.2d at 355.

---

[4] Although there was no evidence that a union "steward" was employed by Banner, the parties did stipulate that Banner employed the son of a Local 21 business representative who, at the time of trial, was president of Local 21 and the District Council. (Pet. App. D, ¶ 20, p. 44a)

Petitioner's argument, again found in its "Statement Of The Case" and relegated to a footnote, that all of the facts relied upon by the lower courts, to which Petitioner unambiguously stipulated, to conclude that it had adopted the area-wide agreements were "isolated incidents," except for its payments of contributions to the Funds for seven years, finds no legal support and Petitioner cites none. (Pet., n.5, pp. 5-6). The only undisputed fact Petitioner cites to support its argument that it never adopted the area-wide collective bargaining agreements is its refusal to do so. It is difficult to imagine how any contract by adoption case would ever be litigated if, at some point prior to litigation, the employer or union did not refuse to sign a collective bargaining agreement with the other. The only other argument Petitioner offers to minimize all of the objective evidence of intent is its "hollow" argument that the Funds stipulated that Banner complied with the terms of the agreement because of coercion.

The record facts establish that for seven years Petitioner has complied with a collective bargaining agreement in exchange for labor peace and, during that time, complained to no authority that it was being unlawfully required or coerced to hire union workers, pay union wages, remit union dues, donate a truck and driver to one of the Respondents, submit to an audit and the other indications of harmonious co-existence with the union and the Funds found by the courts below. Petitioner does not identify a single provision of the agreements it failed to comply with. Petitioner does not cite a single case with this kind of evidence to support its contention that the evidence was insufficient for the trier of fact to conclude that it had voluntarily adopted and agreed to be bound by the CBA. The Petitioner's fourth question presented does

not raise an issue of law. And even if this Court were inclined to accept a case concerning the contract by adoption principle, a part of federal labor law jurisprudence for more than fifty years, to consider a place along the spectrum of potential factual scenarios to draw a line, this is not that case.

III. 29 U.S.C. § 186(c)(5) Does Not Have A Signature Requirement

To reduce the verbiage, Petitioner's argument in support of granting its writ on the question whether a signed agreement is a requirement of § 186(c)(5) boils down to two propositions. First, must there exist at sometime in the history of dealings between an employer and an union a *signed* agreement in which "the detailed basis on which such payments are to be made [by an employer to a trust fund] is specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5) The second question is whether the Second and Seventh Circuits disagree on the first proposition.

Petitioner states that "there is no requirement that the written agreement be a signed written agreement." (Pet., ¶ 41, p. 21) That would seem to be the end of the matter. But Petitioner goes on to qualify this seemingly determinative admission by stating, "but the written agreement does have to be with the employer of the employees involved and there is no such written agreement here. A Court cannot simply accept as a written agreement an area agreement entered into by other employers or a multi-employer group with a labor organization but which this employer specifically refused to sign." (*Ibid.*) What's the problem with an area-wide

agreement or national master agreement, for that matter? Both typically, and the CBA at issue here indisputably, specify a detailed basis on which contributions are to be made to trust funds which are indisputably legitimate trust funds. Petitioner doesn't say.

Rather, Petitioner discusses the numerous cases cited by the Seventh Circuit's opinion and claims there is but a single common thread that reconciles them all with the Second Circuit's pre-ERISA decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. den.*, 394 U.S. 919 (1969), which appears to be one of the first appellate court opinions construing the "written agreement" requirement of § 186(c)(5). That single common thread is, according to Petitioner, that in every decision except for *Moglia* there existed, somewhere in the historic dealings between the union and the employer or Trust Fund at least one *signed* written agreement.[5]

So, though admitting that "there is no requirement that the written agreement be a *signed* written agreement," Petitioner contends there is such a requirement. According to Petitioner, the policy behind the statute is violated if the employer never signed a written agreement, but if he signed a written agreement any time in the past, the signature requirement is satisfied. Exactly why that's so is never clearly stated by Petitioner. The question is, why is it lawful if an employer signed an agreement with an union and thereafter knowingly refused to re-sign, but

---

[5] Petitioner states, "In all those cases at some point earlier in time, there was in fact a written agreement entered into by the employer for his employees, either in the form of a letter of intent or being bound to a multi-employer bargaining agreement which were [sic.] *signed* by the employer." (Pet., p. 6)

continued to comply with the agreement any more satisfactory under the statute than an employer who never signed, but knowingly and intentionally, to maintain labor peace complied with a collective bargaining agreement?

In other words, Petitioner requests this Court to construe § 186(c)(5) as follows: "[*p*]*rovided*, That . . . "the detailed basis on which such payments are to be made is specified in a written agreement with the employer *that has been signed sometime in the past by the employer.*" Otherwise, says Petitioner, "[t]o permit a course of conduct beyond that circumstance invites problems of extortion addressed by this Court in *Arroyo v. United States*[,]" 359 U.S. 419 (1959). (Pet., ¶ 46, p. 24) With all due respect, Respondents simply do not see why an union employer which went non-union an indeterminate number of years in the past is less susceptible to "extortion" by an union representative that an employer that never signed a written agreement, where both employers at the relevant time, to maintain labor peace, knowingly and intentionally comply with an area-wide collective bargaining agreement.

It should go without saying that a manifestation of intent to be bound to a labor agreement by the signature of an employer an indeterminate number of years in the past is not determinative of its intent to be bound once the agreement expires. It is, of course, and must be the employer's conduct following expiration during the relevant period that is determinative of its adoption of successive agreements. That requires the same kind of evidence as required in this case. Petitioner requests this Court to read an undefined, if not undefinable, signature requirement into a criminal statute which is to be strictly construed. This Court has been offered not a single good reason to depart from the rule that "[i]t is the legislature,

not the Court, which is to define a crime, and ordain its punishment." *Arroyo v. United States*, 359 U.S. at 424, quoting, *United States v. Wiltberger*, 5 Wheat 76, 95 (1820); and citing, *United States v. Halseth*, 342 U.S. 277 (1952); and *Krichman v. United States*, 256 U.S. 363 (1921).

The Petitioner's second proposition that the Seventh and Second Circuits are in conflict as to whether § 186(c)(5) should be construed as Petitioner urges should not detain us much longer. In *Brown v. C. Volante Corp.*, 194 F.3d 351 (2d Cir. 1999), the Second Circuit both aligned itself with the Seventh Circuit on the issue presented by this Petition and distinguished its-decision in *Moglia v. Geoghegan*, *supra*, upon which Petitioner's entire argument is constructed, stating:

> The Trustees satisfied their initial burden to demonstrate the absence of a genuine issue of material fact as to whether appellant adopted the two unsigned CBAs . . . The sixty-one remittance reports – most of which were expressly submitted "in accordance with the terms of" the CBAs – appellant's cooperation with the audit, its payment of union wages to employees, and Volante's letter to the Trustees acknowledging appellant's "responsibility to the funds," are sufficient, absent contrary evidence, to establish as a matter of law appellant's intent to adopt the two unsigned CBAs. See, e.g., *Robbins v. Lynch*, 836 F.2d 330, 332 (**7th Cir.** 1988) (granting summary judgment to trustee of funds on claim that employer breached adopted agreement; noting, among other things, that employer "paid the union scale . . . and paid (some) pension and welfare contributions"); *Trustees of Atlanta Iron Workers, Local 387 Pension Fund v. Southern Stress Wire*

Corp., 724 F.2d 1458, 1459-60 (11th Cir. 1983) (per curiam) (upholding finding that employer adopted CBA and agreement to contribute to benefit fund; noting employer's payment of union wages, submission of benefit reports, and accession to audit).

Appellant argues that the unsigned CBAs do not satisfy the ERISA Section 302(c)(5)(B) requirement that payments to a trust fund be made pursuant to a "written agreement with the employer." 29 U.S.C. § 186(c)(5)(B). According to appellant, it did not make a "written agreement" to contribute to the Fund after June 30, 1990 because it did not sign the two subsequent CBAs. Appellant's argument, however, overlooks the statutory language. Section 302(c)(5)(B) does not require that an agreement be signed, only that it be "written" and set forth "a detailed basis on which . . . payments are to be made" to a trust fund. Id. *Accordingly, an unsigned, written agreement satisfies Section 302(c)(5)(B)'s "written agreement" requirement.*[n1] *See Gariup v. Birchler Ceiling & Interior Co., 777 F.2d 370, 375 (**7th Cir.** 1985) (concluding that a "signed, unexpired collective bargaining agreement between the parties is not required to satisfy section 302(c)(5)(B); rather section 302(c)(5)(B) requires only a 'written agreement'").*

> [n1] *Our decision in Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), is not to the contrary.* There, we held that an unsigned, written agreement between a union and a trust fund did not comply with Section 302(c)(5)(B) when the union and the trust fund "never" had a signed CBA detailing the basis upon which payments were to be made. *403 F.2d*

> *at 114, 115.* We rejected a putative beneficiary's argument that its employer adopted the unsigned agreement because, *on the facts of that case*, the employer "did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time." *Id. at 118. We did not, however, graft a signature requirement onto Section 302(c)(5)(B). Unlike the employer in Moglia, appellant's conduct manifested an intent to adopt the terms of the unsigned CBAs.*

Brown v. C. Volante Corp., 194 F.3d at 355. (Bold and underline emphasis added) Not much of a disagreement here. *See*, Seventh Circuit opinion in this case, citing same cases as *Brown*, and citing *Brown*. (Pet. App. 8a, 9a, 17a, 18a, n.8) *Accord, National Leadburners Health & Welfare Fund v. O.G. Kelley & Co.*, 129 F.3d 372, 375 (6th Cir. 1997) ("The statute does not specify any signature requirement and the term 'written agreement' is unambiguous in relation to such.")

The Second and Seventh Circuits have unambiguously stated they agree with each other. Neither agrees with Petitioner. There is no conflict to resolve and absolutely no reason, in logic or law, for this Court to grant Petitioner's writ. This is an unremarkable case.

CONCLUSION

For the foregoing reasons, Respondents request that the Supreme Court deny certiorari.

Respectfully submitted,

MARVIN GITTLER*
ROBERT B. GREENBERG
JOEL A. D'ALBA
ASHER, GITTLER, GREENFIELD
& D'ALBA, LTD.
Suite 1900
200 W. Jackson Blvd.
Chicago, IL 60606
(312) 263-1500

Of Counsel
STEPHEN J. FEINBERG

* *Counsel of Record*

(3)

Supreme Court, U.S.
FILED
APR 18 2005
OFFICE OF THE CLERK

No. 04-1143

IN THE

Supreme Court of the United States

BANNER RESTORATIONS, INC.,

Petitioner,

v.

BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM AND MASONRY INSTITUTE BRICKLAYERS LOCAL 21 PENSION FUND

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

GERARD C. SMETANA
SMETANA & AVAKIAN
39 S. LaSalle Street
Suite 1218
Chicago, IL 60603
(312) 357-0250

Attorneys for Petitioner

193981

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

Petitioner in its Writ of Certiorari seeks review not only because of a conflict with the Second Circuit's Decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert denied*, 89 S. Ct. 1193 (March 24, 1969) but also because of the general importance of the issues presented by the Petition.

Section 302(c)(5)(B) contained in Appendix C of the Petition 29 U.S.C. § 186 subpart (c), "the exceptions only permits payments to be received by or made to a jointly administered labor management trust fund . . . where . . . (B) the detailed basis on . . . such payments are to be made is specified in a written agreement with the employer." (App 38a).

The kind of written agreement, contrary to the holding of the Magistrate Judge in the instant case, as affirmed by the Seventh Circuit may not be the generic area labor agreement which has not exclusively been made for the benefit of the employees of Petitioner Banner. That requirement is spelled out in 29 U.S.C. § 186; § 302(c)(5):

> (5) With respect to money or other thing of value paid to a trust fund established by such representative *for the sole and exclusive benefit of the employees of such employer*.

(App 37a) (emphasis added).

Thus without regard to the language in *Moglia* which also makes clear that absent a written agreement with the employer of the employees involved in the case the receipt of such funds must be returned.

The general concern of Congress in this Statute is clear. Monies may only be accepted by a trust fund as a result of a written agreement with a labor organization for its employees. Duress in making any such payments under the Section is not permitted.

Section 302(c)(5) makes a "written agreement" a *sina qua non* and such agreement clearly must be between the employer, in this case Banner Restorations, Inc., for the exclusive benefit of his employees with the labor organization involved, in this case Bricklayers Local 21. Such written agreement clearly was never entered into though sought by the President of the Local 21, Peter Marinopoulos.[1/]

The "written agreement" requirement cannot be substituted as the Magistrate Judge has done, by simply looking to the "area agreement". This is what the Opposition looks to as well as being sufficient.

We ask the Court to accept this case for review because it presents by stark example the abuse that takes place time and again out in the field by Unions and/or Trust Funds coercing such payments absent a "written agreement".

In the fourth question presented we urge the Court to accept review without regard to the question of coercion. The coercion that occurred at the beginning of every job explains why payments were made for a 7 year period in the absence of a written agreement. In that regard in the *Moglia* case payments were made for far longer than the 7 year period, but the Second Circuit held, the payments had to be returned and could not be paid out to the beneficiary, the widow, in the absence of the "written agreement" mandated by Section 302(c).

The Magistrate Judge discredits the testimony of the 100% shareholder of Banner Restorations Co., Inc. and his son without regard to the fact that there is no testimony to the contrary, because he does not believe that the sole reason Banner made the monthly contribution to the Trust Funds was because of the coercion.[2/] While the District Court criticizes Banner for not

---

[1/] Stipulation No. 20 and No. 25 (App D) (44a and 45a).

[2/] Notwithstanding Stipulation No. 23 (App 44a) an "unqualified" admission of such coercion and Stipulation No. 29 (App 46a) wherein

(Cont'd)

having exercised its right to go to the Labor Board to protest the coercion; however, the Labor Board has been found to be a less than useful vehicle for employers in these circumstances.

In this Court's only interpretation of Section 302(c) in *Arroyo v. United States,* 359 U.S. 419 (1959), this Court announced that the policy concerns of Section 302 must be strictly enforced, because of the Court's concerns about extortion by employee representatives. 359 U.S. 419, 425-26 Coercion by employee representatives is present in this case. If the Court chooses not to reach that issue, the "written agreement" requirement still remains.

The Opposition urges the Court not to accept review by pointing out isolated instances which the Magistrate Judge relied upon to support a ratification argument not available in the absence of a "written agreement". Curiously the Magistrate Judge relies upon the failure of Banner Restorations, Inc. to comply with 3 different Arbitration Awards. Yet as pointed out in our Petition it was the Magistrate Judge who took the Respondent Trust Fund's representative to task during the trial for relying upon those very Arbitration Awards. The Magistrate Judge obtained a concession from the Respondent's Counsel that the Funds had made a mistake and that the Arbitrations were addressed to the wrong Banner Restorations (a different company). Respondent's Counsel admitted on the Record, the Funds were not pursuing the Banner/Axelrod company (mistakenly believed at the time of their Complaint to be the same as Petitioner Banner Restorations, Inc.) In fact it was the Banner/Axelrod company that had signed a written agreement and not Banner Restorations, the Petitioner herein. The detailed discussion in the Open Court colloquy which was set forth in full in footnote 6 at page 9 and 10 of the Petition herein,

---

(Cont'd)

Ciancanelli (the President of Petitioner "asserts" "the payments were made . . . in response to threats . . . to shut his business down if he did not do so".

apparently was forgotten by Respondent, as it had been by the District Court in relying upon 3 Arbitration Awards that had nothing to do with Petitioner.

The other basis used by the District Court to support its credibility determination are truly isolated and unrelated. The District court references a single instance taken from the Stipulation of Fact, where Banner lent one of its trucks to the Respondent Funds, and another for making a payment for one of its employees for delinquent dues.[3/]

The argument made by Respondent, also found in the District Court's Decision and the Seventh Circuit's Decision is that in *Robbins v. Lynch*, 936 F 2d 330 (7th Cir 1988) Judge Easterbrook stated: "the threat to strike was unexceptional". This does not aid the opposition, because such threat in *Robbins* occurred in the context of a union seeking to enforce payments to an *Agreement* it already had. Quite the opposite has been held in the absence of a "written agreement". In *Moriarty v. Larry G. Lewis Funeral Directors Ltd.*, 150 F.3d 773 (7th Cir. 1998) Judge Easterbrook- supported the Petitioner's position in the absence of a written Agreement stating:

> If so, the contributions made on the Lewis' behalf are unlawful for lack of a written agreement (Section 302(c)(5)(B) and must be returned and the pension credits to the Lewis' accounts cancelled.

Moriarty v. Lewis, 150 F.3d 773, 776.

[3/] We recognize that credibility determinations are rarely if ever overturned. But here the District Court limited its determination to not believing the reason for 7 years of payments was solely related to coercion. But as we urge under Question 4 – even in the absence of coercion, the "written agreement" mandate of the Statute is the question presented that raises the conflict in the Circuits that needs to be resolved and is the question of public importance.

We respectfully ask the Court to accept review on this important issue. Pension monies in the absence of a "written agreement" must be returned.

Respectfully submitted,

GERARD C. SMETANA
SMETANA & AVAKIAN
39 S. LaSalle Street, Suite 1218
Chicago, IL 60603
312-357-0250

Counsel for Petitioner